United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2023. 640

TURNER A. WICKERSHAM, APPELLANT,

vs.

CHARLES L. DuBOIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MAY 13, 1909.

Nov. 9. 1909.

Wm Orcutt A.J.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 15, 1909.

In the Court of Appeals of the District of Columbia.

No. 2023.

TURNER A. WICKERSHAM, Appellant,
vs.
CHARLES L. DUBOIS.

a Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed August 30, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

The plaintiff sues the defendant for that, heretofore, to-wit, on the first day of September, A. D., 1906, and for a considerable time prior thereto, for valuable consideration to be paid unto the defendant by prospective bathers, respectively, (including the plaintiff), the defendant maintained a bathing-beach at Chesapeake Beach, in the State of Maryland, and undertook to maintain said bathing-beach,

and everything under the waters thereat and thereon, in a safe and proper condition, so that persons, (including the plaintiff), contracting to enter said bathing-beach and the waters thereof and to bathe there, might do so safely and without injury or damage; and that heretofore, to-wit, on said day, the defendant, for a good, lawful and sufficient consideration, to-wit, for the sum of twenty-five cents, contracted and agreed with the plaintiff that he, the plaintiff, might enter and go upon, and might be entitled to enter and go upon, said bathing-beach, and into the waters thereat and thereon and bathe in

2 said waters and do all of these things safely and without injury or damage, and that then and there the plaintiff, pursuant to said contract and agreement, went upon said bathing-beach and into the waters aforesaid, and, in so doing, without any negligence on his part, stepped with his left foot upon the rough, jagged and splintered end of a certain post, or stake, then and there, beneath said waters, which said post or stake, without the knowledge of the plaintiff, was by the defendant then and there improperly, wrongfully and negligently left, allowed and permitted to so remain, as aforesaid, and in the condition aforesaid; and which said post, or stake, when stepped upon as aforesaid, by its said rough, jagged and splintered end, severely bruised, wounded, cut and injured the plaintiff's said foot, and thereby caused the plaintiff great pain, injury and damage and mental and physical suffering, and caused blood-poisoning to the plaintiff, and for a long time thereafter, to-wit, for three months, kept the plaintiff from his place of employment and prevented his attending to his duties and carrying on his occupation, and caused him great expense, to-wit, the reasonable and proper costs, charges and expenses of and for necessary medicines, necessary services of physicians, nurses and attendants, and of other necessary outlays and expenses, and permanently injured the plaintiff, all of which pain, suffering, injury and damage were suffered by the plaintiff without any fault or negligence on his part but were occasioned by the fault and negligence and improper and wrongful acts and omissions of the defendant, all to the injury, loss and damage of the plaintiff in the amount of three thousand dollars ($3,000), wherefore he brings this suit.

3 And the plaintiff claims the said amount of three thousand dollars ($3,000), besides costs of suit.

COLDREN & FENNING,
WM. M. LEWIN,
Attorneys for the Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

COLDREN & FENNING,
WM. M. LEWIN,
Attorneys for the Plaintiff.

Plea.

Filed October 9, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

Now comes the above named defendant, Turner A. Wickersham, by his attorneys of record, and for plea to the declaration of the plaintiff filed herein says he is not guilty in the manner and
4 form alleged.

McKENNEY & FLANNERY,
Attorneys for Defendant.

Joinder of Issue.

Filed October 17, 1907.

In the Supreme Court of the District of Columbia.

Law. #49773.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

The plaintiff joins issue upon the defendant's plea.

COLDREN & FENNING,
WM. M. LEWIN,
Attorneys for Plaintiff.

5 *Note of Issue.*

Filed October 17, 1907.

In the Supreme Court of the District of Columbia.

Law. # 49773.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

Coldren & Fenning, William M. Lewin, Attorneys for Plaintiff.
McKenney & Flannery, Attorneys for Defendant.

Last pleading filed October 17, 1907.
We furnish the Clerk the above note of issue.

COLDREN & FENNING,
WM. M. LEWIN,
Attorneys for Plaintiff.

6 Supreme Court of the District of Columbia.

WEDNESDAY, *December* 9, 1908.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

Come again the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, upon their oath say they find the issue aforesaid in favor of the plaintiff and assess his damages by reason of the premises at Fifteen hundred dollars ($1,500).

7 Supreme Court of the District of Columbia.

FRIDAY, *January* 15, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

This cause comes on to be heard upon the defendant's motion for a new trial; whereupon the defendant moves the Court for leave to amend his motion for a new trial by striking from Paragraph 5 the words following, viz: "and the attitude of the Court toward counsel for the defendant in connection with such rulings," which motion is granted, and said amendment is accordingly made; thereupon after argument of said motion for a new trial by Attorneys for the respective parties hereto, the same is submitted to the Court for consideration.

Motion for New Trial as Amended.

Filed December 14, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS
vs.
TURNER A. WICKERSHAM.

Now comes the defendant, Turner A. Wickersham, by his attorneys, and moves the Court to set aside the verdict rendered

8 herein, on the 9th day of December, 1908, and to grant a new trial, and as reasons therefor, assigns the following, to wit:

(1) Because said verdict is contrary to law.

(2) Because said verdict is contrary to the evidence.

(3) Because said verdict is contrary to the weight of the evidence.

(4) Because said verdict is excessive and not supported by the evidence.

(5) Because the verdict is the result of prejudice in the minds of the jury adverse to the defendant and resulting from the rulings of the Court on the admission of evidence.

In support of the above ground for this motion, reference is made to pages 90 and 93 of the typewritten transcript of the proceedings in this cause, which occurred when Joseph A. Fisher, a witness for the plaintiff, was under examination in chief by counsel for the plaintiff, the same being as follows:

"By Mr. LEWIN:

"Q. Did you subsequently go to Chesapeake Beach with Mr. Dubois? A. You mean after the Beach was closed?

"Q. After that day. A. Yes sir.

"Q. When? A. On Thanksgiving, I think.

9 "Q. Following this accident? A. Yes sir.

"Q. What did you observe when you went there with him?

"Mr. MCKENNEY: I object. This witness went down there for the purpose of manufacturing testimony.

"The COURT: It is hardly right to call it 'manufacturing.'

"Mr. MCKENNEY: Then, for the purpose of equipping himself to give testimony,—sixty days after the occurrence.

"Mr. LEWIN: If your Honor please, I would——

"The COURT: I do not think you need waste a great deal of time over this matter. The witness says that he stubbed his toe against a post there, and he can tell the jury where it was with reference to this runway. If he saw it more distinctly afterwards, he can tell that.

"By Mr. LEWIN:

"Q. What did you find when you went down there?

"Mr. MCKENNEY: I desire to reserve an exception on this point.

"The COURT: I will note the exception, with great pleasure. He can go ahead first and state what he found there on the day in question.

"Mr. MCKENNEY: That is the day of the accident.

"The COURT: Exactly, the day when he saw this man bandage his foot.

"Mr. MCKENNEY: I did not hear any question of that sort.

10 "The COURT: Well, you have heard the ruling of the Court. You heard that; did you not?

"Mr. MCKENNEY: Yes, your Honor, I heard a ruling of the Court.

"The COURT: You can take your seat. The answer may be given. You will notice that the question is with reference to the post that

you saw there on the day when you saw this plaintiff bandaging his foot, just after he came out of the water. What do you say; did you see any post there?

"A. Your Honor, I did not see the post, because the water was pretty well stirred up.

"By the COURT:

"Q. What did you feel about it? A. I felt the post as I stepped out into the water.

"Q. Describe its location to the jury. A. I turned to the left, as I generally do. I walked out towards the center of the bathing beach, and on the way out I ran my foot against an obstruction.

"Q. That is not describing its location with reference to the end of this runway. Where was it with reference to that? A. Well, I should judge it was about the second post out.

"By Mr. LEWIN:

"Q. Out from what? A. Out from the end of the broken runway.

11 "By the COURT:

"Q. Did you, on that day, discover any others? A. No; I kept away from the end of the pier. When I came in, I came out on the side.

"Q. You say you went down there again on the 30th of November? A. Yes sir.

"Q. Did you look then to see whether there were any posts there? A. There were stubs of posts——

"Q. I say did you look to see whether there were. Just say yes or no to that, first. A. Yes sir.

"Q. Now, what you further saw is that there was a line of posts there? A. Yes sir.

"Q. Corresponding to the posts when the runway was standing? A. Yes sir.

"Mr. MCKENNEY: I desire to note an exception to this.

"The COURT: It will be under exception. You need not describe the condition they were in, but simply state that there were posts there, if there were any.

"By Mr. LEWIN:

"Q. What did you find there when you went there on your second visit, on Thanksgiving? What did you find there with re-
12 spect to the bottom of that bathing place? A. There were posts running in pairs from the outside edge of the boardwalk, out to where the runway apparently ended, and at a point of about three sets of posts from the end of the post, there was a double post, both apparently broken off about four inches from the bottom."

(6) Because said verdict is the result of prejudice in the minds of the jury resulting from remarks in the charge of the Court re-

garding the general duty of the jury in all cases to reconcile the testimony of all witnesses, if possible.

The remarks of the Court above referred to are to be found on pages 180 to 183 of the typewritten transcript of the proceedings in this cause, and are as follows:

"But it is proper that I should make one or two suggestions to you, which apply to this case and to all other cases that will come before you. It is often possible for impartial triers of questions, whether a court or a jury, to reconcile testimony, upon the theory that all of the parties who have testified have intended to tell the truth, but are mistaken for one reason or another. Counsel in the case may be too zealous to look upon the testimony in that way, and yet an impartial trier of the facts may be able to see how the fact was, and yet that nobody had intended to state the thing falsely. Here, for instance, is it reasonably possible, in view of all of the testimony, that the end of the runway might have been boarded up by Mr. Wickersham, or under his direction after the end of it had been carried away, and yet not have been boarded up at the time the plaintiff was down there, and that he may have been testifying as to a different
13 period of time, although testifying honestly. It is worthy of your consideration whether that may have been so.

"We are to bear in mind that the defendant was not notified of this action, or that a claim was to be made against him until some months afterwards, and that none of his employés knew that anything serious had happened, so that when they first thought about the matter some months had elapsed. One of them testified on the stand, for the defendant, and, I think, said that his attention had not been called to it until a little while ago, so that it was nearly two years after the accident. Of course it is possible, in looking back over some months, not to be entirely accurate about the time when a thing was done, and yet the thing may have been done. Mr. Wickersham thinks and says that the storm took a part of the runway out on Friday night, and the other witnesses agree with him. Are you satisfied that he is right about that, and that it was just exactly that night when it was taken out? He says that he had the runway boarded up the next morning. Are you satisfied about that? Do you think from the evidence, that he is surely right about that, or was it, perhaps, at some later time, the next day possibly, when that was done?

"I am not suggesting this to you as my view of the testimony at all, but that you should have all of these things in mind. They are merely by way of illustration, to see if the testimony of the parties may be reconciled on the theory that they are honest but mistaken, on one side or the other.

14 "There is another thing to be borne in mind. Mr. Dubois, if we assume that he was honest, says that he went down there and went into bathe on this day, and that he injured himself in that way; that he did not suppose it was much of an injury at that time; that he came home and it grew worse; that it was a serious matter to him so that he knows just when it was and has every reason to remember about it; that it made an impression upon

him because it was a serious matter to him. He is testifying to something which he says positively did occur. That is positive testimony, affirmative testimony.

"Some other witnesses may testify that he did not see Mr. Dubois there. That means that he does not remember seeing him there. He may have seen him there and have forgotten about it, whereas Mr. Dubois could not very well remember something that did not occur, and if he were honest he would not pretend to. There is that difference in the two classes of testimony.

"Of course when Mr. Wickersham testified that he had this runway boarded up, he is also testifying to a positive fact. The important question there is when did he have it boarded up, and was it at the time with reference to which Mr. Dubois, Mr. Bond, Mr. Fisher and Mrs. Fisher are testifying, for they testify that it was not boarded up at the time that Mr. Dubois received his injury.

"You will not give undue weight to any suggestions I have made to you in regard to what may be the true explanation of this matter, because it is your province and yours alone to decide these
15 questions of fact. It is not the business of the Court to decide them or to tell you how you should decide them. It is always the duty and the pleasure of triers of questions of fact, if they reasonably can do so, to reconcile the testimony on some theory that will preserve the honesty of the witnesses. They are not to find that some witness has testified falsely, unless that seems to be necessary. If the evidence can be reconciled on the theory that they are mistaken, that is always the better theory to adopt, where it is reasonable.

"If you are satisfied that the contract was entered into between these parties, that the plaintiff fulfilled it on his part by the exercise of due care, and that the defendant broke it on his part by failing to exercise due care in making the place safe, or in not properly warning the people who came there to bathe while it was unsafe, and if you are satisfied that the plaintiff received his injury by reason of this breach of the contract on the part of the defendant, then the question would be how much was he injured, and you would have to take up the question of his injuries."

McKENNEY & FLANNERY,
Attorneys for Defendant.

To Messrs. W. M. Lewin and F. G. Coldren, Attorneys for the Plaintiff:

Please take notice that the foregoing motion to set aside the verdict and grant a new trial in the above entitled cause has been filed and placed upon the motion calendar and the same will be called
16 to the attention of the Court, Mr. Justice Stafford presiding, on Friday, December 18, 1908, at ten o'clock A. M., or as soon thereafter as counsel can be heard.

McKENNEY & FLANNERY,
Attorneys for Defendant.

Opinion.

Filed February 24, 1909.

In the Supreme Court of the District of Columbia.

No. 49773. At Law.

CHARLES L. DUBOIS, Plaintiff,
vs.
TURNER A. WICKERSHAM, Defendant.

The defendant was a keeper of a bathing beach with bath houses and the plaintiff undertook to bathe thereat. In doing so he stepped upon a stake standing upright under the water and punctured his foot receiving a severe injury. He brought this action to recover damages. He framed his declaration in such a way that it is not easy to determine whether it should be treated as a declaration in contract or in tort. After setting out that the defendant was maintaining a bathing beach for hire and that on the day named the defendant for the consideration of twenty-five cents, contracted with the plaintiff that the plaintiff might go upon the beach and bathe in the waters there, "and do all of these things safely and without injury or damage," he alleges that the plaintiff in pursuance
17 of said contract did go upon the beach and into the waters and without any negligence upon his part injured himself as before stated, and further alleges that said stake had been "improperly, wrongfully, and negligently left" in the place where it was by the defendant. This clearly states a contract and although it does not directly and positively allege a breach of the contract it does allege what apparently amounts to a breach by way of inference; that is to say, it does not allege that the *defendant* might not have safely bathed but alleges that he did not safely bathe, although free from negligence himself. On the other hand the declaration may be treated as sounding in tort and as setting out the contract relation between the parties merely for the purpose of showing that the defendant owed the plaintiff a certain duty. It is in keeping with the view that the count is in tort, that it contains the allegation that the plaintiff was free from negligence and that the defendant was guilty of negligence, for neither of these elements is noticed in the statement of the contract. It being possible to treat the declaration as either in contract or in tort it seems fairer to both parties and especially to the pleader to treat it as in tort for then all the allegations are pertinent and proper and none need be rejected as surplusage. The case was submitted to the jury in language strongly and consistently indicating that the declaration was in contract, but the jury were required to find all that it would have been required to find if the declaration had been treated as in tort. It found that the defendant was the keeper of the beach and invited the plain-
18 tiff to bathe there and contracted with him that he might bathe there in consideration of the fee received by the de-

fendant from the plaintiff; that the plaintiff was free from negligence in the use he made of the place; that the defendant was guilty of negligence in allowing the stake to remain where it was and in failing to warn the plaintiff of the danger, and that the plaintiff's injury resulted directly from such negligence on the part of the defendant. These facts all having been found in the plaintiff's favor, as they must necessarily have been found under the instructions, the question is whether the verdict should be set aside and a new trial ordered merely because the declaration might have been treated as a declaration in contract, and because the court referred to it as a declaration in contract in its charge to the jury. The defendant says that he was, as a matter of law, misled in that he was notified by the declaration that he was sued in contract and that such contract was claimed to be an absolute guaranty on his part that the bathing place was safe, whereas the case was submitted to the jury on the theory that the contract claimed was not that the defendant absolutely guaranteed the safety of the beach but only undertook to use reasonable care to see that it was safe. It should be noted that the defendant plead to this declaration as a declaration in tort, that is, he did not plead non assumpsit, but did plead not guilty. In view of the allegations of negligence, which would have been entirely superfluous and impertinent in a declaration upon contract, and in view of the form of the defendant's plea, it seems to the court that there can be little reason to suppose that the
19 defendant was in fact misled or surprised. The case was submitted to the jury in a way more favorable to the defendant in respect to the duty incumbent upon him than if it had been submitted upon the theory of an absolute guaranty, because the jury were told that in order to find against the defendant they must find not merely that the place was unsafe but that it was unsafe through the defendant's failure to exercise reasonable care. It is admitted by the defendant's counsel that this is the law of the case upon the facts shown, and it seeming clear to the court that it is also the law of the facts as alleged in the declaration, when the declaration is treated as in tort, as the defendant's counsel themselves treated it in pleading to it, the court is unable to find any substantial reason for granting the motion upon the ground of variance. Needham *vs.* Pratt, 40 Ohio St., 186 is a case worth noting in this connection. The plaintiff sued the defendant upon an account and the defendant attempted to plead in off set a breach of warranty independent of the subject matter of the plaintiff's action, and alleged that the representations constituting the warranty were not only false but were known by the plaintiff to be false, and were made with intent to defraud the defendant. The question was whether the defendant could use this matter in off set in view of the allegations of fraud. When stripped of those allegations the answer constituted a good cause *ex contractu*. The court held that the answer might be treated as in contract and the allegations of fraud disregarded. So in the present case, if the declaration may be treated as either

in contract or in tort it should at this time be treated as in
20 tort for the reasons given.

The only importance of the contract in the declaration is to show the relation between the parties from which sprang the duty of the defendant to use reasonable care in keeping the place safe. This duty did arise by reason of the fact that the defendant was inviting the plaintiff, with others, to use the place for bathing. There was no necessity that there should be an express agreement on the part of the defendant to keep the place safe. It was his duty under the law to use reasonable care to that end. Consequently an action of tort was maintainable under the test laid down in Atl. &c. R. R. Co. *vs.* Laird 164 U. S. at 399. "The distinction is this if the cause of complaint be for an act of omission or nonfeasance, which without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the count is founded upon contract and not upon tort. If on the other hand the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent then the count is one of tort."

There can be no doubt that the relation between the keeper of a bathing beach and a bather is such that the duty arises upon the part of the keeper to use reasonable care to provide a safe place, whether any special contract covers the point or not. The declaration in this case shows the relation to have existed and the duty to have
existed and it alleges a breach of that duty saying nothing
21 about any breach of contract as such. For the foregoing reasons the motion for a new trial on the ground that the verdict is contrary to law must be overruled.

The defendant also moves for a new trial on the ground that the verdict is the result of prejudice in the minds of the jury adverse to the defendant resulting from the rulings of the court on the admission of evidence, and refers in support thereof to two incidents of the trial when the court directed one of the counsel for the defendant to be seated. A stenographer was employed by the defendant who has made a transcript of his notes and that transcript is referred to in argument in support of the motion. It shows all that a transcript can be expected to show and naturally does not show the very thing which moved the court to give the direction complained of. As it seemed to the court at the time it was necessary to require the counsel to be seated in order to avoid an unseemly occurrence in the court room. The tone of voice, the attitude, the facial expression of the counsel were of such that if they had been ignored at the time the court would have practically abdicated and left the management of the trial to the counsel. Now that weeks have elapsed since the occurrence and after long reflection upon the incident the court is still of the opinion that it was necessary to give the direction which was given, but the court is not satisfied that it was free from blame in the matter which led up to the incident. It is inclined to think that if its own attitude towards the counsel had been more

gentle and equable up to a certain point the necessity would
22 not have arisen. It is ready to believe that the counsel had no deliberate purpose to assume a disrespectful attitude. The court is entirely satisfied that the verdict of the jury could not have been influenced in any degree by this incident and that whatever may be said of it it does not constitute a ground for a new trial.

It is urged that the verdict is excessive in amount but with this contention the court is unable to agree.

The motion for a new trial is accordingly overruled.

WENDELL P. STAFFORD, *Justice.*

Supreme Court of the District of Columbia.

WEDNESDAY, *February* 24, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

This cause coming on to be heard upon the defendant's motion for a new trial, the same having heretofore been argued and submitted to the Court, it is ordered that said motion be, and hereby is overruled, and judgment on verdict ordered.

23 Therefore it is considered that the plaintiff recover against the defendant Fifteen hundred dollars ($1,500.) with interest thereon from this date, being the money payable by him to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

Order for Appeal, &c.

Filed February 25, 1909.

In the Supreme Court of the District of Columbia, the 25th Day of Febr'y, 1909.

At Law. No. 49773.

DUBOIS
vs.
WICKERSHAM.

The Clerk of said Court will please enter an appeal from the judgment of the Court in the above entitled cause, and issue citation to the plaintiff.

WILLIAM HITZ,
Attorney for Defendant.

24 In the Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS
vs.
TURNER A. WICKERSHAM.

The President of the United States to Charles L. DuBois, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 25″ day of February, 1909, wherein Turner A. Wickersham, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 25″ day of February in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Cl'k.

Service of the above Citation accepted this — day of ——, 190–.

——— ———,
Attorney for Appellee.

[Endorsed:] (11) No. 49773. Law. DuBois *vs.* Wickersham. Citation. Issued Feb'y 25″, 1909. (12) Served copy of the within Citation on Charles L. DuBois personally Feb. 25, 1909. Aulick Palmer, Marshal. McKenney & Flannery, Attorney- for Appellant. $1 paid Marshal.

25 *Memorandum.*

March 9, 1909.—$100. deposited in lieu of appeal bond.

Supreme Court of the District of Columbia.

WEDNESDAY, *March* 31, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

Upon motion of the defendant in open Court, it is ordered that the time within which to submit the bill of exceptions in this cause be, and it is hereby extended to and including April 20, 1909.

THURSDAY, *April* 15, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

Now comes here the defendant by his Attorneys and submits to the Court his bill of exceptions taken during the trial of this cause, and the same is taken under consideration.

26 MONDAY, *April* 19, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

The bill of exceptions in the above entitled cause having been submitted to the Court on the 15th day of April, 1909, it is by the Court this 19th day of April, 1909, Ordered that the time for considering, signing and settling the bill of exceptions herein is hereby extended to April 30th 1909, and the time for filing the transcript of record in the Court of Appeals in this case is hereby extended — May 15, 1909.

WENDELL P. STAFFORD, *Justice.*

THURSDAY, *April* 29, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

Upon motion of the defendant in open Court, it is ordered
27 that the time within which to settle the bill of exceptions in this cause be, and it is further extended to and including May 3, 1909.

FRIDAY, *April* 30, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At Law. No. 49773.

CHARLES L. DUBOIS, Pl't'f,
vs.
TURNER A. WICKERSHAM, Def't.

Now comes here the defendant by his Attorneys and prays the Court to sign, seal and make part of the record, his bill of exceptions taken at the trial of this cause (heretofore submitted) now for then, which is accordingly done.

28 *Bill of Exceptions.*

Filed April 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49773.

CHARLES L. DUBOIS
vs.
TURNER A. WICKERSHAM.

Be it remembered that on the 7th day of December A. D. 1908, being a day in the October A. D. 1908 Term of the Supreme Court of the District of Columbia, the above entitled cause came on for trial and was heard by and before the Honorable Wendell P. Stafford, holding a Circuit Court, and a jury duly impaneled and sworn to try the issues joined in such behalf.

Messrs. William Meyer Lewin and Fred G. Coldren appeared as attorneys of record on behalf of the plaintiff, and Messrs. Frederic D. McKenney and William Hitz appeared as attorneys of record on behalf of the defendant.

And thereupon the plaintiff to maintain the issues on his behalf joined, was himself sworn as a witness and gave evidence tending to prove that he resided at 1835 Monroe Street, N. W., in the City of Washington, District of Columbia; that he had been employed in the General Land Office, Department of the Interior, for ten years; that on the first day of September, 1906, as well as at the time of the trial, he was Chief of the Division of Public Surveys in the General Land Office; that on said first day of September, 1906, the
29 same being Saturday and a half holiday, he boarded the half past two o'clock train for Chesapeake Beach and arrived at the Beach about one hour thereafter; that upon arrival he went im-

mediately to the bathing houses and at a gate which was there bought a ticket for 25 cents, which ticket entitled him to the use of a bathroom, towel and bathing suit and the privilege of bathing at that point.

Q. What point? A. In the vicinity—in front of the bath house. After paying 25 cents to a lady at a window at the gate to the enclosure occupied by the bath houses he went into that enclosure from the gate. She gave him a ticket which on presentation enabled him to go through the gate and get the bathing suit. He gave up the ticket there. He was directed to the bathroom, and after putting on the suit went down steps which were in the enclosure onto a platform leading underneath the boardwalk out into the water into an enclosure there where people were bathing; probably 30 or 40 people; there was an enclosure around the bathing place in the water; that the enclosure was made by a wire fence of some kind; that this platform led directly from the bath house where he put on his bathing suit, out under the boardwalk to this enclosure around the bathing place in the water; that there was no other way known to him of getting into that enclosure and it was the way used by persons generally; that he got to the end of the platform which leads out from under the boardwalk; which platform was supported by posts and a rail, and stepped off to go to the right and in doing so stepped on a jagged post or rather part of a post which had been broken
30 off; he knew that it was a jagged post because he felt of it as soon as he hurt his foot.

Q. How did you hurt your foot? A. It was a wound made by this jagged post. The splinters of this post remained and one of them entered my foot. He sat down to see what had hurt him and felt this post there and then proceeded to examine the wound, which was a cut about a half inch long in the bottom of his left foot; he tried to clean the sand out of the wound and as soon as he saw that he had hurt himself he went on to the platform and back into the bath house and asked the lady there, where he could get some court plaster, and was at first told that they did not know of any, but subsequently somebody gave him a piece of adhesive plaster and he put it on his foot as best he could; he then went to the railway station somewhat less than a quarter of a mile distant and took the first train for Washington, which train left Chesapeake Beach about six o'clock; on the journey his foot pained him and on arriving in Washington he stopped at Simms' drug store, where he bought an antiseptic liniment and applied the same to his foot that night; his family was away in Maine, and he was alone in the house. In the night his foot got very painful and he was up several times. In the morning it was so bad he raised the window and called his next door neighbor and asked him to telephone to a doctor, and also to telephone for a frined. The doctor, Dr. C. W. Buchanan, came that morning and dressed the wound and came every day for nearly a month, treating the foot until his regular family physician,
31 Dr. Bliss, returned, when he took charge. His friend also came that first day and looked after him; Dr. Buchanan lanced the foot and otherwise treated it and kept him in bed a long

time; was still confined to his bed when Dr. Bliss came home, during which time, about a month, he was in bed all the time and suffered considerable pain especially when the wound was dressed; the Doctor stated that the wound was a punctured wound and it was quite difficult to heal; that it gave him considerable pain and worry and apprehension, and he found it difficult to sleep at night; when the Doctor wanted to cut into the foot and plaintiff dreaded it the Doctor said, "I must try and save the foot," and that led plaintiff to believe that the wound was serious and he apprehended the possibility of lockjaw from the tearing of the wound; that he was confined to the house and did not go to the office until the first working day in November following and then only to report; he walked on crutches up to the 19th of November and afterwards walked with one crutch and a cane; Dr. Bliss came in towards the end of September; during his treatment he called in consultation Dr. McDonald, who probed the wound and treated it; he, plaintiff, was absent from his office practically two months altogether, but the time of absence was charged up against his annual leave and sick leave; at the time of the accident his salary was $2400.00 a year and at the date of trial the same had been increased to $2750.00 a year; that at no time since the date of the accident had his salary been less than $2400.00 a year; that for the purpose of treating his circulation and avoiding possible blood poisoning and pain,
32 he also called in Dr. C. B. Tufts, an Osteopath, who treated the foot and leg by manipulation; that Dr. Bliss rendered a bill for $56.00; Dr. Buchanan rendered a bill for $55.00; Dr. McDonald rendered a bill for $5.00, and Dr. Tufts rendered a bill for $123.00; Dr. Tufts said that if plaintiff "got any damages she would expect the full bill, but if not she would reduce the rates, for cash payment," the amount of the cash payment being fixed at $55.00; Dr. Tufts gave him 60 treatments and her regular charge was $2.00 a treatment; he incurred other expenses for medicines and the like amounting to about $15.00; he went back to Chesapeake Beach once after the day of the accident, could not state the exact date that he went down there, but thought "it was the following Spring," but could not remember, and it might have been New Year's Day; he went there on that occasion with a Mr. Fisher.

Q. What did you discover when you went back there? A. I found——

Mr. McKENNEY: I object.

The COURT: What is it you offer to show?

Mr. LEWIN: We want to show his examination, to show the location of the object, the nature of the object that hurt him, and its relative position to others, so as to show the way in which it got there.

The COURT: You want to show that the same condition remained?

Mr. LEWIN: Not for that purpose, but from what he saw——

The COURT: I understand. You do claim that the con-
33 dition remained the same, your evidence will tend to show that?

Mr. LEWIN: Yes sir.

* * * * * * *

By Mr. LEWIN:

Q. Did you go back there Thanksgiving Day, or was it Thanksgiving Day that you went back there? A. It might have been Thanksgiving Day, it was on a holiday.

Mr. MCKENNEY: I object——

The COURT: The answer cannot be excluded. The question itself was a leading one, and if it had been objected to I would have excluded it——

Mr. MCKENNEY: That is included in my objection, that it is leading.

The COURT: You cannot object after you have heard the question and then wait until the answer is given. But avoid leading questions thereafter.

Mr. MCKENNEY: I move that this question and the answer be stricken out, on the ground, if your Honor please, that the question was leading, that the answer indicates definitely that the witness is guessing.

The COURT: The objection is overruled on the ground that no objection was made to the question, that there was ample opportunity for counsel to object, and the answer is considered admissible as an answer to the question as put. An exception will be noted.

At the time he was hurt he made an examination of the end of the post by feeling it with his hand; the water was roily and this post could not be seen on that account; he could not see it
34 when he stepped on it; it was about ten feet from the end of the platform; the post was about three inches square and it was broken off so that the jagged ends projected two or three inches above the surface of the sand; the post was completely covered by water and the part that remained driven in the sand was in a perpendicular position; the splintered top of the post was about two feet under the water of Chesapeake Bay; the bath houses were about 100 feet from the shore and the point where he received his injury was about sixty feet further out into the water; the stairs lead from the bath houses down through the water to a platform and the platform runs out under the boardwalk and is supported on posts; the platform had been broken off and beyond the broken end was the post on which he stepped; some six or eight months after he was injured he saw the defendant Wickersham and spoke to him about his accident, but Wickersham declined to enter into any arrangement for damages simply saying that he "was the Lessee of the bathing place down there," further indicating that he was such Lessee at the time of the accident; Wickersham further said that he was there himself on the day of the accident and that no such accident had been reported to him and he rather expressed doubt as to its having occurred; witness has occasional "twinges" in his foot "that may be the result of that injury;" that it was six or seven months after the injury before he was able to do away with the use of his cane and that during that period there was nearly always a slight pain when using the foot which had been injured; the post he stepped on was

the same size as the remaining posts supporting the portion
35 of the platform which still remained; and the broken post stepped on was in line with the posts that still remained; that on the occasion of his visit to Chesapeake Beach subsequent to the receipt of his injury he saw several ends of posts in the sand under the water in the direction occupied by the runway or platform prior to the date on which he received his injury; and at the time of the accident in the space of about 100 feet between the bath houses and the shore there was debris along the shore, wood and such things. Out in the enclosure for bathing there was a float and a barrel out there, used by the bathers to dive from; that on the day of the accident, while he noticed that the runway was shorter than formerly, the outer end thereof was not closed or boarded up and there was no sign or warning of danger to any one who might step off the outer end of said runway.

On cross-examination the plaintiff testified that he called upon the defendant Wickersham at his office in the Colorado Building in company with Mr. Lewin and Mr. Coldren; that he went there to talk over the matter with him; on that occasion Mr. Wickersham said in response to a question put to him by Mr. Lewin that he was the Lessee of that Beach the question asked was "whether he was the Lessee, the proprietor"—and he said "he was;" in entering the water on the day of the accident witness stepped right down off the end of the platform and "then went over to the right;" the end of the platform was open, no warning signs around there; he probably entered the water about four o'clock in the afternoon; he made no complaint of his injury except to the young man and woman
36 in the ticket office whom he asked for court plaster; he later returned to the Beach he thinks on Thanksgiving Day at the suggestion of one of his attorneys whom he had consulted in respect to bringing a suit against Mr. Wickersham or somebody for this injury; in company with his attorneys he called upon Mr. Wickersham; neither he nor his attorneys communicated with Mr. Wickersham until several months after the injury occurred because he did not know, up to the time of calling on Mr. Wickersham, who was responsible; thinks his attorneys made several attempts to find out who was responsible, including inquiries whether the Chesapeake Beach Railway Company controlled the bathing beach privileges or whether there was a separate lessee; at the time of the accident he was receiving a salary of $2400.00 a year and no deduction was made from his salary on account of any time that was lost as the result of the accident; since the accident he had been promoted and at the time of the trial was receiving a salary of $2750.00; has paid the bills of Dr. Buchanan, Dr. Bliss and Dr. McDonald in full; he had paid Dr. Tufts $21.00 cash on account of her bill, and she agreed that if he did not prevail in this suit she would accept $55.00 in full settlement; at the time of the accident he did not know that Mr. Wickersham "was in charge;" he went to the bathing house, paid 25 cents to the attendant at the window and got "some sort of a check or equivalent for my 25 cents, which (equivalent) I presented for a bathing suit at the entrance to the bath.

Q. Did you notice that ticket or check at all? A. No, I cannot recall what it was.

37 Q. Would you know another one if you saw it? A. It is rather doubtful. It might have been a brass check; it might have been a pasteboard check.

Q. You do not know whether it was a brass check or a pasteboard check, do you? A. I know it was something I exchanged for a bathing suit.

On the day of the accident, while in bathing, witness talked with Frank H. Bond, who was also bathing at the same time; Bond was about fifty or sixty feet away from him and at the time of the accident witness called to him that he (witness) had hurt himself "on one of these stakes," to which Bond replied "I encountered them myself; it is the grossest kind of carelessness to leave them there that way;" on the train on his return to Washington he talked with Mr. J. Albert Fisher; the water at Chesapeake Beach is salt water and he had been in the habit of bathing there once or twice each season from about 1898 or 1899. On referring to memorandum he now states it was Thanksgiving Day, November 30, that he visited the Beach after the injury.

Witness' attention was drawn to the fact that a part of the runway into the water had been carried away at the time he arrived at the end of it; there was nobody there to warn people, and no signs that there was any danger around there.

On cross-examination a piece of cardboard resembling a ticket was handed to the witness by defendant's counsel and the witness was asked whether it was a ticket like this that he paid his quarter for.

38 A. As I said before, I have a very vague impression about it, about what I received, because I immediately went around the corner of the gate, without looking at it to see what it was, and passed it in for a bathing suit. I went through the gate and presented it.

Q. Did you give the whole of it up at one place? A. Well, it is possible that as this is a coupon ticket, that part of it was given at the gate, and then the other part for the bathing suit.

Q. In any event, you do not recollect with any distinctness that you did buy something that was different from that ticket? A. No, I do not. I couldn't say that I bought anything that was different from this.

Q. You are inclined to believe that it was the same sort of thing as that; are you not? A. Yes, sir.

Mr. McKenney: I would like to have that marked for identification.

(The tickets referred to are filed herewith, marked "Exhibit DuBois No. 1," and are as follows:

Chesapeake
Beach Baths
Admit One
Not Good if Detached

Chesapeake
Beach Baths
Suit Ticket
Not Good if Detached

(The line between above coupons being perforated).

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness WILLIAM R. BUCHANAN, who testified that he was a practicing physician in the City of Washington; that he was called in to attend, professionally, Charles L. DuBois the plaintiff on the morning of September 2, 1906 at the house of said patient; that he found DuBois suffering from a punctured and infected wound an inch deep in the sole of his foot, which foot was swollen and red, contained pus, and was apparently very painful; he inserted a probe and found pus; that he washed out the pus as well as he could with a syringe and antiseptic solution, put in drainage, and applied surgical dressing, and visited said patient daily thereafter for 24 days, one or two days twice a day, during all or most of which time the plaintiff was confined to his house; that at the expiration of said time he turned the patient over to Dr. Bliss, his regular physician, who had then returned to the city; that the wound which he treated could have been caused by the patient stepping on a splintered post; his bill against the plaintiff for his said services was $48.00; the infection did not subside promptly, and about a week after he first saw him he opened the foot, under local anesthesia, and washed out the wound more fully. By this time the infection had extended along toward the toes so that it was advisable to make an incision and get better drainage. He did that and thoroughly washed the wound and re-applied dressings. These dressings were renewed every day and the wound washed out every day for 2 weeks or more. When Dr. Bliss returned about September 24 the wound was still discharging some pus, and the infection was still extending toward the toes. It was an infected, punctured wound of the foot. During his treatment there was a great deal of pain and consequent loss of strength and poor nervous condition. There was blood poisoning present to a limited extent, as all infection is considered blood poisoning. An infected wound is one through which germs have entered into the blood system, and so cause pus by the breaking down of the

tissues. He saw the plaintiff Sunday morning the day after he received the wound. That morning he found the whole foot swollen. There was a great deal of redness, and there was pus in the wound itself. The foot was bandaged, and had a cotton dressing over the wound. Found no foreign substance other than pus, no dirt. He did not touch that foot to the ground, as far as I know, for several weeks, indeed all the time I was treating him.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness CHARLES L. BLISS, who testified that he was a practicing physician in the City of Washington; that he treated the plaintiff DuBois at his house on September 25, 1906 for a punctured and infected wound in the bottom of the left foot, a little over an inch long, which wound proved very obstinate and painful in treatment; that he made continuous visits to the patient at his house up to October 20th; scattered visits subsequent thereto, after which the patient came to his office for treatment up to November 20, 1906 before it healed up; had to scrape it out two or three times; that his bill for said services was $56.00; had to use quite severe measures, which were very painful to plaintiff, in trying to get the wound to heal up; he was not able to go out; he could
41 not step on the foot; he had to go on crutches; the foot was very painful; the treatments were very painful to him; it would take some hours to get over the effect of the treatment each time; he did not sleep well during that time; he was kept in the house and was naturally made nervous by the pain and the confinement; when I found how obstinate it was I advised him to see Dr. McDonald; also Mr. DuBois asked me as to employing an osteopath, and I told him I thought some osteopathic treatment, or massage, would help the circulation in the part, and help it to heal; there is a scar that shows very plainly where the wound was; I used an instrument to clean out this wound, and it went into an oblique direction from the middle of the foot toward the toes about an inch or more; I was positive as to dates because I have a record of my visits in my book; I made a very nominal charge of $56.00 as he is an old friend of mine, and he was kept in his house so long; it was a very small bill for the work I did; his general condition of health before this was very good; he was on crutches when he called on witness November 19, 1906.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness FRANK BOND, who testified that he was the Chief Clerk of the General Land Office and knew the plaintiff DuBois personally; that witness went to Chesapeake Beach September 1, 1906; that he saw DuBois the plaintiff standing there in the water near the end of the runway on that day; that he passed some words with DuBois while in the water, witness wanted him to come out in the deep water, and went on without
42 waiting, but DuBois said nothing about being hurt, so far as I recollect, and the witness did not know or learn on that day that DuBois was injured while bathing, but heard about said

injury the next Monday morning; that the witness ran his foot against the base of submerged stakes or posts while bathing in the water on that day, and wondered why they were there; they were not visible, being below the surface and the water was roily; that he had been in the habit of bathing there prior to this occasion, and on this day he saw that a portion of the runway had been carried away, but nobody else directed his attention to this fact; DuBois returned to the office about two month after the injury; he was then pale and lame.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness CHARLES W. CLAGETT, who testified that he is a member of this Bar; that he know the defendant Wickersham personally; that the defendant's clerk Miss Bagnan was in charge of the bath house at Chesapeake Beach in the year 1906; and that in 1906 or 1907 the defendant Wickersham, in a casual conversation spoke to him of his business at the Beach and the receipts therefrom. That Chesapeake Beach is situated in Calvert County, Maryland.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness JOSEPH A. FISHER, who testified that he knew the plaintiff and lived near to him on September 1, 1906, on which day he saw the plaintiff in the bath houses at Chesapeake Beach after he came out of the water and as he was about to put adhesive plaster on a cut in the bottom of his foot;
43 and thereupon, on direct examination, said witness testified as follows:

Q. What did you notice with respect to the walk having been shortened? A. It was broken off; but I didn't notice it until after I had gotten into the water.

Q. You did not notice it? A. I stubbed my toe on the stump.

Q. Is that what called your attention to the fact that the walk had been shortened? A. Yes sir.

Q. Did you hurt your toe when you struck it?

Mr. MCKENNEY: I object to that.

Mr. LEWIN: I offer it simply as showing the character of the obstruction there.

The COURT: I do not think it is admissible under that class. The only view in which it might be admissible would be if it is claimed that he would be more likely to remember it if he got hurt than if he had not. We will leave that where it is for the present.

By Mr. LEWIN:

Q. Did you subsequently go to Chesapeake Beach with Mr. DuBois? A. You mean after the Beach was closed?

Q. After that day. A. Yes sir.

Q. When? A. On Thanksgiving Day, I think.

Q. Following this accident? A. Yes sir.

44 Q. What did you observe when you went there with him?

Mr. McKENNEY: I object. This witness went down there for the purpose of manufacturing testimony.

The COURT: It is hardly right to call it "manufacturing."

Mr. McKENNEY: Then, for the purpose of equipping himself to give testimony, sixty days after the occurrence.

Mr. LEWIN: If your Honor please, I would——

The COURT: I do not think you need waste a great deal of time over this matter. This witness says that he stubbed his toe against a post there, and he can tell the jury where it was with reference to this runway. If he saw it more distinctly afterwards, he can tell that.

By Mr. LEWIN:

Q. What did you find when you went down there?

Mr. McKENNEY: I desire to reserve an exception on this point.

The COURT: I will note the exception, with great pleasure. He can go ahead first and state what he found there on the day in question.

Mr. McKENNEY: That is the day of the accident.

The COURT: Exactly, the day when he saw this man bandage his foot.

The COURT: What do you say; did you see any post there?

A. Your Honor, I did not see the post, because the water was pretty well stirred up.

45 By the COURT:

Q. What did you feel about it? A. I felt the post as I stepped out into the water.

Q. Describe its location to the jury. A. I turned to the left, as I generally do. I walked out towards the center of the bathing beach, and on the way out I ran my foot against an obstruction.

Q. That is not describing its location with reference to the end of this runway. Where was it with reference to that? A. Well, I should judge it was about the second post out.

By Mr. LEWIN:

Q. Out from what? A. Out from the end of the broken runway.

By the COURT:

Q. Did you, on that day, discover any others? A. No; I kept away from the end of the pier. When I came in, I came out on the side.

Q. You say you went down there again on the 30th of November? A. Yes sir.

Q. Did you look then to see whether there were any posts there? A. There were stubs of posts——

Q. I say did you look to see whether there were. Just say
46 yes or no to that, first. A. Yes sir.

Q. Now, what you further saw is that there was a line of posts there? A. Yes sir.

Q. Corresponding to the posts when the runway was standing? A. Yes sir.

Mr. McKENNEY: I desire to note an exception to this.

The COURT: It will be under exception. You need not describe the condition they were in, but simply state that there were posts there, if there were any.

By Mr. LEWIN:

Q. What did you find there when you went there on your second visit, on Thanksgiving? What did you find there with respect to the bottom of that bathing place? A. There were posts running in pairs from the outside edge of the boardwalk, out to where the runway apparently ended, and at a point of about three sets of posts from the end, apparently at the end of the posts, there was a double post both apparently broken off about four inches from the bottom.

The witness thereupon further testified as follows:

That he had been there nearly every Saturday before this injury; that he went up and paid 25 cents at the bath house, got a suit and went in and undressed; everybody had to do the same thing; never saw bathers get in there any other way; he had friends who
47 took their bathing suits with them that Summer of 1906; they paid their quarter, their admission just the same as those who got their bathing suits there; as a rule the bathers would walk out to the end of the runway and dive off from the end of the runway; witness very often did; it just happened that he did not dive off that day; he did not notice that the walk had been shortened that day until he got into the water; after the injury he called at Mr. DuBois' house several times, but the first time he saw him he thinks was probably six weeks after the accident; he was hobbling on crutches then.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness JAMES T. TUFTS, who testified that he is an assistant attorney in Office of the Assistant Attorney General, Interior Department; he personally knew the plaintiff DuBois in September, 1906 and saw him on the morning of the first day of September, 1906 and on the following morning, Sunday, the second of September, 1906, on which day he received a request from Mr. DuBois by telephone to come to see him at his house; that he went there and found DuBois in bed with an injury at the bottom of his left foot; the foot was swollen and so was the leg to the knee; shortly thereafter Dr. Buchanan arrived and dressed said injury; that he, the witness, stayed with Mr. DuBois at night, and most of the days, about a week until his family got home; that during this time Mr. DuBois was in a painful and nervous condition, and it seemed very serious; he wrote and then telegraphed, because the letter was too slow, to get his family home from Maine; his family came home—cut short their affairs there and hastened
48 home; they took care of him then and relieved me; he saw the wound, assisted the surgeon in dressing the foot, took such care of him as he could when the surgeon was not there, and

sometimes called for him; it was something like two months before he got out again; witness loaned him crutches and he got slowly out; it was Spring before he was properly able to attend to business.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced as a witness FRED G. COLDREN, who testified that he is a member of the Bar of this court, an old friend of Mr. DuBois, and had been employed as counsel by Mr. DuBois in various matters prior to this case; that several months after the injury to Mr. DuBois at Chesapeake Beach the witness, together with Mr. DuBois and Mr. Lewin, called at Mr. Wickersham's office in the Colorado Building, and talked with Mr. Wickersham concerning the DuBois matter in answer to a letter from Mr. Wickersham written in response to a letter from Mr. Lewin to Mr. Wickersham regarding the DuBois matter; at this interview Mr. Wickersham said that Mr. Flannery was his attorney in this matter; that at said interview with Mr. Wickersham Mr. DuBois stated the circumstances of the injury fully to Mr. Wickersham, and Mr. Wickersham replied in effect that he was the lessee or proprietor of that bathing beach at the time in question; that he was there in charge that day and that no injury to a bather was reported or made known to him that day. In connection with the testimony of this witness the following letters were introduced in evidence. Mr. McKenney admitted that the signature to the first letter was Mr. Flan-
49 nery's signature:

FEBRUARY 12, 1907.

William Meyer Lewin, Esq., Attorney at Law, Columbian Building, City.

DEAR SIR: Referring to your letter of the 3d ultimo in relation to the claim of Mr. C. L. DuBois for personal injuries alleged to have been sustained at the Bathing Beach at Chesapeake Beach, Maryland, on or about September 1, 1906, I beg to say that I had an examination made by the officers of the Chesapeake Beach Railway Company and the town officials at Chesapeake Beach. They report that they have no knowledge whatever of the matter complained of by Mr. Dubois and that the premises upon which he claims to have received his injury do not fall within their jurisdiction.

The officials of the Railway Company also brought the matter to the attention of Mr. T. A. Wickersham, the Lessee of the Bathing Beach, and were informed by him that he had never heard anything of an injury to a man of this name, and he thinks that if a serious accident to Mr. Dubois or anyone else had occurred at the Bathing Beach it would have been brought to his attention.

Yours very truly,

J. S. FLANNERY."

50 (2)

"Wm. M. Lewin, Attorney at Law, Rooms 312-313-314 Columbian Building, 416 Fifth Street N. W., Washington, D. C.

DEAR SIR: Mr. C. L. Dubois of this City has put into my hands for adjustment or trial the matter of his injuries received Sept. 1, 1906, by the laceration of his foot caused by stepping on the jagged end of a broken post under the water at the bathing beach, Chesapeake Beach, Md., of which beach I understand you were at that time the lessee. I will be glad to confer with you at your earliest convenience in reference to the matter and the favor of a prompt reply will greatly oblige.

Truly yours, WM. M. LEWIN.

Feb. 25, 1907.

T. A. Wickersham, Esq."

(3)

Turner A. Wickersham, Colorado Building, Washington, D. C.

William M. Lewin, Esq., City.

DEAR SIR: Your favor of February twenty-fifth with ref
51 erence to one C. L. Dubois, received. I have not as yet been able to get hold of my attorney for consultation, however, if you wish, you may come and see me, and bring your client with you.

Yours truly, T. A. WICKERSHAM.

February twenty seventh, 1907."

Mr. LEWIN: I now offer in evidence a certified copy of the record of a lease, made by the Clerk of the County Court of Calvert County, Maryland.

Said lease is in the words and figures following, to wit:

(U. S. I. R. Stamp $1.00.)

This Agreement, made this 26th day of June, A. D. 1899, by and between the Chesapeake Beach Railway Company, a corporation under the laws of the State of Maryland, party of the first part, and Turner A. Wickersham, of Salt Lake City, Utah, party of the second part, Witnesseth:

Whereas, the party of the second part is desirous of obtaining a lease of the bathing privileges at Chesapeake Beach in the State of Maryland, including the right to erect, maintain and operate bath houses and their necessary appurtenance and

Whereas, the party of the first part is willing to lease to the party of the second part such privileges and rights upon the term and conditions hereinafter set forth.

52 Now, Therefore, in consideration of the premises and the sum of one dollar by each of the parties hereto paid by the other at time of the signing of these presents, the receipt of which is

hereby acknowledged, the party of the first part does hereby lease and grant unto the party of the second part for the term of forty (40) years the exclusive privilege of erecting, operating and maintaining bath houses and their appurtenances at, on, or near the water front of Chesapeake Beach, subject, however, to the following conditions:

1. The bath houses and appurtenances shall be erected by the party of the second part at his own cost and expense according to plans to be approved by the party of the first —, at such suitable and convenient place or places on the water front as the party of the first part may hereinafter indicate. It is understood and agreed that such bath houses shall have reasonable access to and from the boardwalk to be constructed along the said water front, and further that the party of the first part shall not require the construction of a class of bath houses of greater relative cost than that of the best class of such structures at Atlantic City, New Jersey.

2. In consideration of the leasing of the above mentioned privileges the party of the second part hereby covenants and agrees that he will erect at such place or places as may be designated by the party of the first part as aforesaid and according to plans to be approved by it, such number of bath houses as may be necessary
53 to supply the reasonable demands of visitors and others at such Chesapeake Beach, and will suitably equip and maintain the same use, and will pay to the party of the first part at such times and in such manner as the said party of the first — may require fifteen (15) per cent. of the entire gross proceeds derived from the operation of the bath houses and the business therein to be conducted, provided, however, that receipts from the sales of bath suits, bathing caps, stockings, shoes and belts, if any shall not be taken into consideration in computing the above mentioned gross proceeds.

In case the party of the second part at any time fails for sixty (60) days after notice in writing from the party of the first part to provide sufficient and proper bathing facilities to supply the reasonable demand of visitors and others at Chesapeake Beach, then said party of the first part shall be at liberty to erect and maintain or cause to be erected and maintained at Chesapeake Beach such additional bath houses and their equipments as it may be necessary.

3. The party of the second part will keep accurate daily accounts of all proceeds derived from conducting the said business and every part thereof and such accounts shall be subject to the inspection of the party of the first part or its duly authorized agents at any and all times and the party of the second part will submit to such checks and devices for ascertaining the correctness of said accounts as the party of the first part may from time to time devise and require.

54 4. In the event of such bathing houses, establishments, and appurtenances, or any of them, being injured or destroyed by fire or other of the elements, between the months of May and October in any year, the party of the second part shall and will, at his own cost and expense, proceed at once to remove the debris and to repair or reconstruct the same as the case may require, and failure to begin the removal of said debris and to commence the necessary

repairs or reconstruction and to prosecute the same in a businesslike manner within thirty days, shall operate to abrogate this lease; should such destruction take place after the first of October in any year, then such bath houses shall be reconstructed and equipped ready for business by May first following, and failure in such regard will operate to abrogate this lease.

5. Upon the termination of this lease by expiration of time or otherwise the party of the second part shall vacate the structures which he may have erected hereunder within thirty days thereafter, or within such longer period as the party of the first part may concede, and said structures shall then and there become the property of the said party of the first part, who shall be at liberty to take immediate possession thereof and thereafter retain the same.

6. The party of the second part agrees to complete the erection of the first set of bath house- and open same for business not later than the fifteenth day of August, A. D. 1899.

55 This lease shall be binding upon the party of the first part and its successors, and upon the party of second part and his assigns, it being hereby agreed that the party of the second part may assign his interest herein to such corporation as may be organized for the purpose of carrying on the contemplated business.

In testimony whereof, the parties have respectively signed and sealed this agreement the day and year first above written.

[Seal's Place.]

CHESAPEAKE BEACH RAILWAY COMPANY,
By OTTO MEARS, *President.* [SEAL.]
TURNER A. WICKERSHAM. [SEAL.]

Witness:
JOHN L. McNEIL.

Recorded November 1, 1902, and Exam- per
GEO. W. DOWELL, *Clerk.*
(Duly certified.)

And thereupon the defendant WICKERSHAM to maintain the issues upon his part joined testified that he was the Lessee and Manager of the Chesapeake Beach Baths at Chesapeake Beach, Maryland, on the first day of September, 1906, on which day the plaintiff claims to have been injured at said Baths; that he did not learn of said alleged injury on that day nor until some time in the following February; that the bathing season at said Beach closes each year immediately after Labor Day, which is the first Monday in September; that in 1906 Labor Day fell on the third day of September; that for two or three days prior to the first day of September, 1906 a storm had occurred and continued at said Beach; that said

56 storm on the night of Friday, August 31, 1906 washed away a portion of the platform which extended out into the water from the bath houses, the portion of said platform so washed away by the storm being one section about *16* feet long; that said platform or runway was supported by timbers 4 x 4 driven into the

ground or sand while a hand-railing is fastened above the floor of the platform for persons to hold to as they walk out; that before the accident to the runway it was about *250* feet long, extending out into the water; that he fixes the time when the platform was washed away as the night of Friday, the last day of August, because Saturdays and Sundays are always the busy days at the Beach, and Monday being Labor Day and the end of the season he bemoaned the loss of the platform just at that time; that he was living at the Beach at that time, and sleeping within sixty feet of the platform, which was in place when he went to bed on Friday night, and gone when he got up the next morning; that when he found that a portion of the platform had been carried away, he knew that some of the stakes formerly supporting the same remained in the same, and he therefore instructed one of his employees, Elijah Adams, to nail boards across the outer end of the remaining portion of the platform so that anyone going into the water would have to get off the platform on either side, and thus be prevented from getting on these stakes; that he thereupon stood near by to see that Adam carried out these instructions, and he saw Adam nail the boards across the end of the runway, this being done on Saturday morning, and before anyone had gone on there; the first train arrives at 12 o'clock, and
57 the bathing usually commences about one or two o'clock; that he knew there must be broken stakes in the line of the runway, but the high tide and heavy southeast wind then prevailing brought the water a foot over the floor of the platform and made it impossible to inspect the bottom of the Beach or to do anything about the stakes at that time; that he instructed his office force to tell everybody that an accident had occurred, that a part of the platform had been carried away; and to caution all bathers to be careful and not get inside the line of the runway; that the weather was bad and there were comparatively few bathers there that day; that throughout the afternoon he stood in a pavilion about two feet above the heads of persons going out on the platform into the water, and cautioned everybody who went out to keep to the right or left and not to go into the line of the broken platform.

Q. How do the prospective bathers get the right to go into your bathing houses at all, before they get to the point of—— A. (Interrupting.) They buy a ticket at the front window.

Q. Who has charge of that window? A. Miss Bagnan.

Q. Did she have charge of it in 1906? A. She did.

Q. What kind of a ticket is it? A. (After examining ticket Exhibit DuBois No. 1) This is the ticket.

Q. Is that a specimen of the ticket that is sold? A. It is
58 just exactly such a ticket as we sold at that time.

That throughout the season of 1906 Miss Bagnan had charge of the office of the bath houses, assisted by Calver, Joyce and Smith, all of whom were on duty on Saturday afternoon, September 1, 1906; that several colored men were also on duty on that day; that in the office of the bathing beach he always kept a full supply of articles to furnish first aid to persons who might become ill or injured while bathing, these articles consisting of such things as

Arnica, Witch Hazel, liniment, bandages, etc., and being kept on top of the rack of pigeon holes where the valuables of bathers were lodged, and at all times immediately accessible to the persons in the office; that Dr. Talbert, a practicing physician, had his office within 200 yards of the bath houses at the time in question; that there was no complaint of injury to any person on September 1, 1906, and the season closed on September 3, 1906; our season closed and we take that fence in; that is, we took the wire in from the fence every fall; that he did not claim or exercise any exclusive right in respect of bathing in the immediate vicinity of this platform; that not everybody that bathed there and within the enclosure went through his bath house; that he placed said platform and enclosure there and the enclosure consisted of a wire screening to keep out sea nettles, but it was open at the shore end and had steps over the seaward end, for people to come in and out, so that many persons could, and every day they did, enter there and bathe, by coming in directly from the Beach; there was a great quantity of muddy substance congregated and gathered in there, and he built this runway
59 so the bathers could get beyond that without having to wade through it.

And thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness ELIJAH ADAMS, who testified that he worked for the defendant Wickersham in the summer and early fall of 1906 at the Bathing Beach, quitting said work some time after Labor Day that year; that according to his recollection Labor Day in that year occurred about the second of September; that one night about Labor Day, when he went home from work in the evening, the platform was intact, and when he returned in the morning it had been partially wrecked by a storm, and that between ten and eleven o'clock in the morning after the platform was damaged, and before any trains came in, he boarded up the end of the platform under orders from the defendant Wickersham; that he boarded up the open end of said platform from the floor to the top of the railing; that Jenkins, another employee of the Bathing Beach, assisted him in doing this work, and getting the planks and nails to do it with; that he was on duty throughout the day when he boarded up the platform, being mainly engaged in wringing out and drying bathing suits that had been used, and he neither saw nor heard of any one being injured while bathing on that day, and he thinks that the platform was still boarded up at the end when he left the employment some time after Labor Day.

On cross-examination by plaintiff's counsel this witness testified: that he is not certain whether it was Labor Day that he boarded up the platform; does not remember whether the platform was
60 carried away any other year than that year or not; he worked there seven seasons.

Thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness HENRY JENKINS, who testified that he worked for the defendant Wickersham at the Chesapeake

Baths during the season of 1906, and for several other seasons, and that he was so employed until after Labor Day, 1906; that the portion of the platform extending into the water at the Beach was carried away at night and he assisted Adams in boarding up the end thereof on the morning after it was wrecked; he does not recall the first of September, 1906; does not recall Labor Day, 1906; does not remember when the runway went out; is still in Mr. Wichersham's employ; has been there five seasons; could not say the runway did not go out at any other time.

Thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness ALBERT W. JOYCE, who testified that he was employed in the office of Mr. Wichersham's bath houses at Chesapeake Beach in the summer and early fall of 1906; that Miss Bagnan sold the tickets in said office, a coupon ticket, two tickets attached, and he handed out bathing suits to the customers in return for one of the coupons, he and Miss Bagnan standing near each other in the same room or compartment, but dealing with customers through different windows; that at that time he was living at Chesapeake Beach; that one evening in 1906, when he left his work at night the platform was intact; that the weather was stormy the day before and when he returned the next morning a portion of the platform had been washed away; cannot tell what day of
61 the week that was; that on said morning the end of the platform that still remained was boarded up; that he did not see the work of boarding it up done, but that about noon, or shortly after that time, he noticed that it had been boarded up, and that it was still boarded up when he subsequently left the employment for the season; that he was on duty in the office of the Bathing Beach on the afternoon of said day and nobody complained to him of having been hurt while bathing there on that day, and he did not hear of any such complaint having been made, and that he does not remember any one asking for court plaster, or anything of that character on that day; that Mr. Calver and Mr. Smith were also employed in similar work at the Beach about that time and might have been in the ticket booth with Miss Bagnan on the afternoon in question.

Thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness PIERRE P. SMITH, who testified that he was employed at Mr. Wickersham's bath houses at Chesapeake Beach in the summer and early fall of 1906; is now employed by Mr. Wickersham, and has been for many years; that his duty was to give out bathing suits to customers and to do similar things; that he performed this duty in the office at the side of the young lady where the man comes through with his ticket; during the last of the season of 1906 the weather was bad and windy all during the week; one night when he returned to Washington from his work the platform was intact and when he returned to the Beach the next day on the 12 o'clock train a part of it had been washed out; cannot fix the

time of the week; and he remarked to Mr. Wickersham that
62 "you have lost some of your boardwalk there last night while I was in town;" that a portion of it extending about forty feet out from the shore, was left intact and the outer end thereof had been boarded up; was the first thing he noticed; that a stock of liniments, drugs and court plaster was always kept in the office in the booth where the tickets were sold; he did not remember any one asking for court plaster or a similar thing on the day after the platform was washed away; on said day as he handed suits to customers, both he and the young lady who sold tickets told people to be careful of the platform underneath the water as a part of it had been carried away; he did not remember hearing that any one had been injured there at that time; and never heard of such an accident until recently; during the four years he worked at the Beach various people asked for court plaster and similar things and they were always given to them; during the summer of 1906, while he worked at the Bathing Beach he lived in Washington and his hours of duty at the Beach were from 12 o'clock noon until the close of the day's business at night; on the day after the night when the platform was partially wrecked he went in bathing between half-past four and five o'clock in the afternoon; he walked down part of the platform that was left standing and entered the water at one side by crawling under the hand-railing because the end was boarded up.

And thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness GEORGE A. CALVER, who testified that he is a student of medicine in the George Washington University; he had been employed for the last three summers by
63 Mr. Wickersham at Chesapeake Beach and was on duty in the bath houses from the first week in August until and including Labor Day, 1906, which fell on the 3d of September; during the week preceding Labor Day in that year there had been heavy easterly winds with rough weather at Chesapeake Beach; he was living in a cottage at North Chesapeake Beach and the rough weather carried away a portion of the platform on the Friday night before Labor Day; when he left work on said Friday evening the water was rough and so high that it covered the floor of the platform and when he came to work on the next morning he noticed a portion of the platform was gone, and on that morning the end of it was boarded up he don't remember exactly how, and obstructed so that it was impossible to go straight out into the water,—this boarding up being done on the Saturday before Labor Day by the colored men employed around the place; he usually went in bathing every afternoon but does not especially remember bathing on the same day that the end of the boardwalk was boarded up but did bathe while the boarding up remained, entering the water by going under the side rail in the platform; on the Saturday before Labor Day he was on duty in the ticket and suit booth, Miss Bagnan was selling tickets and Smith and Joyce were also about the offices during the afternoon, there being no one else besides these persons employed in the ticket selling booth on that day; drugs and court plaster had been kept in

this booth ever since he had been employed there, being placed on the top of the pigeon holes reserved for valuables and near where the ticket seller sits; he did not remember any one complaining on that day of being hurt or asking for court plaster; he would
64 have been apt to know of such complaint because he usually administered the first aid dressings to persons who might be injured there; if he did not think himself able to take care of such persons he called in Dr. Talbert, whose office was near by; the end of the platform was boarded up when he left the employment on Labor Day; cannot remember any warning being given to patrons on that day about going into the water, with respect to a portion of this runway having been carried away.

And thereupon the defendant, further to maintain the issues upon his part joined, produced as a witness Miss LOUISE BAGNAN, who testified that she is Mr. Wickersham's secretary; that she was employed at Mr. Wickersham's bath houses in the year 1906 and during the summer and early fall of that year was on duty in the office of the bath houses at Chesapeake Beach, selling tickets, checking valuables and looking after things generally; she recalled Labor Day of that year by the fact that for about a week prior thereto hard stroms occurred, and that she and Mr. Wickersham frequently discussed the fact that these storms had practically wiped them out of the end of the season, which closes on Labor Day; as a result of these storms a section of the platform had been completely carried away, this section being about the middle third of the entire runway; this occurred in the night and it was noticed when the employees went to the place in the morning, a couple of days before Labor Day; Mr. Wickersham had his men fasten up the end of the platform so that people could not get off the end, and into the broken portion; Mr. Wickersham told everybody about the
65 place to caution patrons to step under the rail on either side of the platform, and he stood out on the pavilion himself and told bathers to be very careful where they stepped; she told everybody to whom she sold tickets to be careful, and from where she sat in the office she heard Mr. Wickersham calling people to step off on either side and not to go around in front where the rest of the platform remained; any one could see that the boardwalk had been damaged as it was all broken up.

Q. Do you remember the tickets you sold on that day? A. Yes.

Q. Will you look at this ticket (exhibiting "Exhibit DuBois No. 1" to the witness) and state whether it is one of the kind of tickets being sold down there at that time? A. Yes sir, it is.

Q. Did you sell any other kind of tickets there? A. No; that is the only kind we have ever had.

She has been employed at the Beach every season since it has been opened and that there has never been a time when court plaster, bandages, liniments and other articles for first aids to injured persons were not at hand in the office of the bath house; these things were kept so near to her that she could reach them without getting out of her chair; she was in the ticket booth during the

whole afternoon of the day after the platform was wrecked, but she does not remember that any one asked for court plaster or a similar article on said day or that any one complained or reported
66 an injury on that day or on any day between the damage to the boardwalk and the close of the season; or that any bather spoke of having come into contact with the stakes of the broken platform; she would remember such an occurrence if it had happened because they have always been particular about helping people who were ill or injured; the enclosure at the bathing Beach consisted of a wire netting to keep out sea nettles; it was possible for bathers generally to enter this enclosure without going through the bath houses and a great many people did so without paying the fee, and anybody who bought a ticket had the right to the use of a bath house.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced JOSEPH A. FISHER, as a witness in rebuttal, who testified that he bathed at Chesapeake Beach on September 1, 1906, and that he did not remember seeing the end of the platform boarded up, and did not remember that anybody gave any warning at all as to danger before he got into the water; if there had been any boarding up at the end of the platform he would most likely have fallen over it; if there had been a board there two feet high or a foot high he would have seen it.

Thereupon CHARLES L. DUBOIS, the plaintiff, further testified that on the day when he was injured while bathing at Chesapeake Beach the end of the platform was not boarded up, but was all open; that there was nothing at all there; that no warning of danger was given to him or to any one in his hearing by any person at the beach; is positive as to this; received not the slightest warning from
67 Miss Bagnan or any one.

By Mr. LEWIN:

Q. Did you see any Doctor's sign at the station? A. I did not.

On the cross examination of said witness in rebuttal the following occurred:

By Mr. MCKENNEY:

Q. Did you make any inquiry as to whether there was a Doctor anywhere around there?

The COURT: That is not material. That was a part of your case, if you wanted to go into it, when he was on the stand before. This does not meet any point brought out by the plaintiff.

Mr. MCKENNEY: Does your Honor rule that he cannot answer that question?

The COURT: Read the question.

(The question was repeated as follows:)

"Did you make any inquiry as to whether there was a Doctor anywhere around there?"

Mr. LEWIN: I object to that. It was gone into in chief.

The COURT: The question is excluded.
Mr. MCKENNEY: An exception please.
The COURT: It will be noted.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced FRANK BOND, as a witness in rebuttal, to
68 testify that he bathed at Chesapeake Beach on September 1, 1906, and that the end of the platform was not boarded up on that day; he is absolutely positive about that; there was nothing of the kind there; that there was nothing to indicate any danger; he did not see any danger signals nor hear any; that he walked out on the platform as usual and stepped off the end as usual, and he was not warned at all, either at the office or elsewhere, of there being any danger; that his recollection of the matter is that a considerable portion of the end of the walk had disappeared, and was not the same as he had seen it on previous occasions, but that he walked to the end and got off at the end; if there had been any boarding up at the end of the runway he certainly would have seen it; he walked out on the walk and stepped off as usual at the end; he never got off at the side because it was so muddy; was not warned by anyone, never heard a word or a sound of warning; there was nothing in the shape of boards nailed up or obstructions to prevent people going off; he got off at the end and got on at the end also.

And thereupon the plaintiff, further to maintain the issues upon his part joined, produced ELIZABETH FISHER as a witness in rebuttal, who testified that she was at Chesapeake Beach with her son on the day Mr. DuBois was hurt; that her son went in bathing while she watched the bathers from the pavilion; that she could see the platform or runway from where she sat; that she had frequently been to the Beach before; that the platform appeared shorter than it had formerly been, but there were no boards nailed across the end of it where people got off into the water; that she saw Mr. DuBois
69 limping after he came out of the water; that she arrived at the Beach about two o'clock, before lunch, and heard no warnings of danger given while she was there; that this was the Saturday before Labor Day; she heard no signals nor warnings given to look out for danger from the pavilion; that she was in the pavilion; that she saw a great many people going in bathing there; noticed the people getting off this runway into the water; did not notice anything peculiar about their method of getting on or off the runway; it seemed to her they went just about as they always did; she was watching them.

Thereupon, counsel for the plaintiff and the defendant each respectively announced that they had no further evidence to give in the cause, and thereupon the foregoing being all of the evidence given in the course of the trial by each of the respective parties, counsel for the defendant Wickersham moved the Court to instruct the jury to return a verdict for the defendant upon the ground,

(1st) that said defendant Wickersham had not been sufficiently connected with the *locus in quo,* and

(2d) that no evidence had been submitted in proof of the contract nor of the breach of duty alleged and set forth in the declaration, which motion was overruled by the Court and an exception to such action of the Court duly noted.

Thereupon, the Court charged the jury as follows:

Gentlemen of the jury inasmuch as this is the first case in which you have sat, I shall spend a little more time and take rather
70 a little more pains than I shall need to hereafter in submitting cases to you.

Your oath requires you to try the issue presented in each case. That means that you are to try the question at issue between the parties and nothing else. You are not to go off into collateral matters. So that the first thing to do, in all cases that come before you, is to find out exactly what the question is that you have to determine. It is the duty of the Court to point that out to you very clearly.

In all cases tried in this court the burden is upon the party who goes forward. The party who goes forward in this case is the plaintiff, Mr. Dubois. That means that he undertakes to make out by the evidence, what he sets up in his declaration. If that fails, the case fails, because he is the one who brings the case into court and he undertakes to make it out.

In order to make it out he must produce enough evidence so that even after you have heard all of the evidence introduced by the defendant, your minds fairly incline to his side of the case; that is in weighing all the evidence you are more inclined to take his view of the case than the defendant's view of it, that you believe the truth is with him rather than with the defendant.

In this case the plaintiff has brought an action upon a contract which he claims was entered into between him on the one part and Mr. Wickersham on the other part; that that contract was broken by Mr. Wickersham, and that he, the plaintiff, was damaged by reason of its being broken, so that he ought to recover these damages.

71 Consequently, there are four questions in this case: First, whether a contract was entered into; second, whether it was broken; third, whether the plaintiff was damaged, and fourth, if he was damaged, how much.

Suppose then that we take these questions up. What is the contract which the plaintiff claims was entered into? He says—not to go into the particulars of the declaration—that at the time in question the defendant was maintaining a bathing beach and undertook to maintain it; that he undertook to furnish that as a bathing place for those of his customers who chose to come and pay the requisite fee, and that as a part of that contract he undertook to give them a safe place in which to bathe. Then he says that he, the plaintiff, came there as one of the customers to patronize that establishment, and paid his quarter, the required fee and went in to bathe. He admits, in his declaration, that it was a duty on his part, to conduct himself carefully and he says that he did; but, he says, notwithstand-

ing that, the place was unsafe by reason of this post that was left there, and that without any carelessness on his part he stepped upon it and was injured.

He says that it was a breach of this contract, on the part of the defendant to allow that post to be there in that way. Then he sets out how he was injured, and the consequences that came from the injury he received, the pecuniary damage it was to him and so forth.

I submit it to you, as a question of fact, upon all of this evidence whether the two parties here did enter into the contract de-
72 scribed in this declaration. There is evidence tending to show that they did, and if you are satisfied by the fair balance of the testimony, that they did enter into that contract, then that part of the case is made out.

There is some evidence here tending to show that Mr. Wickersham did not absolutely control the territory within this wire fence; that others came in there who did not come through his gate. I charge you that it is not necessary that he should have had the absolute control of that tract of land or beach. It is not necessary that he should have had the legal right to have excluded therefrom all persons, except those who came through his gates. The question, on that point, is whether he invited his customers to come there and go down into the water at that time to bathe, within that enclosure; and if he received a fee therefor, in consideration of their privilege to do that, whether he had the right to give them the privilege or not is of no consequence, if he in fact undertook to do it.

The bath-houses, it is conceded, were there, the runway was there. What was it there for? Was it a part of the understanding between the defendant and those who came there, like the plaintiff, to bathe that they should or might go down upon that runway and out into the water, and step off from it into the water to bathe in this enclosure? Was that clearly held out to them as a thing which he was offering to them in consideration of the fee, as well as the privilege of having a bathing suit and a house in which to change their clothes?

If so, then that part of the case would apparently be made
73 out. If he operated this place there for his customers and provided this runway for them as a means for them to go from the bath house to the water and into the water, so that it constituted an invitation to them to use it, and if he expected that they would use and they naturally expected that they were to use it, why then he was apparently offering them that portion of the beach for this purpose, and if he took control of it for that purpose, supervised it, fenced it in and undertook to regulate it, then it is of no consequence whether he had the actual right to do all that he was doing or not. If he undertook to do that, then the law says that he was bound to exercise reasonable care and prudence to see that it was a safe place for the bathers to do what he had invited them to do at that point, always understanding, of course, as the declaration admits, that it was the duty of the other party to the contract to conduct himself carefully.

If the plaintiff went down there and went in there not as a tres-

passer, then he came in under this contract. If he paid his fee and was furnished with a ticket and went in with the others then he came in under that contract and is a party to it.

It is not admitted here that he went in at all. In the argument some doubt seems to be cast on the point as to whether he went there at all. It is all a question of fact for you to decide.

If you are satisfied by the fair balance of the testimony that he did go down there and did go there as a customer then that point is settled.

74 It is admitted, practically, that this was an unsafe place at that time, immediately after that runway was removed.

Mr. Wickersham said he knew it perfectly well, that is he knew it as well as one could know anything he had not seen, he knew it had been swept away and knew that there must be posts which had been broken off there, and which would be dangerous, and he says because he knew it he took the steps which he did take to guard customers against injury.

So that two questions would seem to arise right there. In the first place, was the plaintiff careless? He admits, by his declaration, that it was his duty to be careful, and if he did not fulfill his part of the contract he could not complain that the other party did not fulfill his.

Is there anything in the evidence which leads you to find that the plaintiff himself was careless? Was he warned that there was any danger there? Did the situation warn him that it was dangerous?

It is argued to you that the situation itself did warn him that it was dangerous, that he had been there before, and that he said, in his evidence, that he knew that part of the runway had been taken away. I do not recall exactly what the evidence from him was upon that subject; but the question as to what the evidence was is peculiarly for you and I have no doubt that you will remember in regard to that.

Mr. Wickersham says that he was there on that day and
75 notified everybody who came down of the danger. If he did, if this man came down, he notified him. It is for you to say whether he is correct about that, and whether this man did receive a notice either from Mr. Wickersham or from anyone else, so that he knew of the danger there was at that place. If he did, and was himself careless about it, no claim is made that he would be entitled to recover.

But if he was not in any way careless and received his injury in stepping down upon a stake which anyone must admit was something that made the place dangerous at that time, and if there was nothing to warn him to keep away from that point—I say if he was not at all careless about it, that part of the case would seem to be made out, namely, that the defendant had failed to provide a safe place.

Was it true that, by reason of his lack of reasonable care, he did fail to provide a safe place. He says this runway had been swept away in the night, and that before any of the bathers came down there he took steps to protect them; that, in the first place, he had

the end of the runway boarded up so that the bathers could not get off the end of it but would have to go off the side. There is a conflict in the evidence as to whether that is true or not, as to whether that was done on that day. He says that he stayed there himself and warned everybody, and that he notified his employees there to tell everyone what had happened, and to warn them of the danger.

On the other hand the witnesses for the plaintiff, as well as the plaintiff himself, testify that there was no warning given to them, that they heard none, and that the end of the runway was not
76 boarded up. There is a question for you. Of course the court has nothing to do with such questions. It is for you to decide, upon all the evidence, who is correct about it. But it is proper that I should make one or two suggestions to you, which apply to this case and to all other cases that will come before you. It is often possible for impartial triers of questions, whether a court or a jury, to reconcile testimony, upon the theory that all of the parties who have testified have intended to tell the truth, but are mistaken for one reason or another. Counsel in the case may be too zealous to look upon the testimony in that way, and yet an impartial trier of the facts may be able to see how the fact was, and yet that nobody had intended to state the thing falsely. Here, for instance, is it reasonably possible, in view of all the testimony, that the end of the runway might have been boarded up by Mr. Wickersham, or under his direction after the end of it had been carried away, and yet not have been boarded up at the time the plaintiff was down there, and that he may have been testifying as to a different period of time, although testifying honestly. It is worthy of your consideration whether that may have been so.

We are to bear in mind that the defendant was not notified of this action, or that a claim was to be made against him until some months afterward, and that none of his employees knew that anything serious had happened, so that when they first thought about the matter some months had elapsed. One of them testified on the stand, for the defendant, and, I think, said that his attention had not been called to it until a little while ago, so that it was
77 nearly two years after the accident. Of course, it is possible, in looking back over some months, not to be entirely accurate about the time when a thing was done, and yet the thing may have been done. Mr. Wickersham thinks and says that the storm took a part of the runway out on Friday night, and the other witnesses agree with him. He says he had the runway boarded up the next morning. Are you satisfied about that? Do you think from the evidence, that he is surely right about that, or was it, perhaps, at some later time, the next day possibly, when that was done?

I am not suggesting this to you as my view of the testimony at all, but that you should have all these things in mind. They are merely by way of illustration, to see if the testimony of the parties may be reconciled on the theory that they are honest but mistaken, on one side or the other.

There is another thing to be borne in mind. Mr. Dubois, if we assume that he was honest, says that he went down there and went

in to bathe on this day, and that he injured himself in that way; that he did not suppose it was much of an injury at that time; that he came home and it grew worse; that it was a serious matter to him so that he knows just when it was and has every reason to remember about it; that it made an impression upon him because it was a serious matter to him. He is testifying to something which he says positively did occur. That is positive testimony, affirmative testimony.

Some other witness may testify that he did not see Mr. Dubois there. That means that he does not remember seeing him there.

78 He may have seen him there and have forgotten about it, whereas Mr. Dubois could not very well remember something that did not occur, and if he were honest he would not pretend to. There is that difference in the two classes of testimony.

Of course when Mr. Wickersham testified that he had this runway boarded up, he is also testifying to a positive fact. The important question there is when did he have it boarded up, and was it at the time with reference to which Mr. Dubois, Mr. Bond, Mr. Fisher and Mrs. Fisher are testifying, for they testify that it was not boarded up at the time that Mr. Dubois received his injury.

You will not give undue weight to any suggestions I have made to you in regard to what may be the true explanation of this matter, because it is your province and yours alone to decide these questions of fact. It is not the business of the Court to decide them or to tell you how you should decide them. It is always the duty and the pleasure of triers of questions of fact, if they reasonably can do so, to reconcile the testimony on some theory that will preserve the honesty of the witnesses. They are not to find that some witness has testified falsely, unless that seems to be necessary. If the evidence can be reconciled on the theory that they are mistaken, that is always the better theory to adopt, where it is reasonable.

If you are satisfied that the contract was entered into between these parties, that the plaintiff fulfilled it on his part by the exercise of due care, and that the defendant broke it on his part by failing to

79 exercise due care in making the place safe, or in not properly warning the people who came there to bathe while it was unsafe, and if you are satisfied that the plaintiff received his injury by reason of this breach of the contract on the part of the defendant, then the question would be how much was he injured, and you would have to take up the question of his injuries.

You have heard the testimony on that subject. It was his duty to conduct himself as a prudent and careful man from that time on, and to treat his injury as a reasonable prudent and careful man would treat it. He says he did not think, at the time, that it was serious and he did what he could there; that he called for court plaster—he has gone over that again and again in answer to counsel. He says he did what he could for himself there and went home; that he at first thought that it would be enough to call at a drug store and get something with which to treat it, but finding it grew worse, after he got home, he called in a physician, who has told what was done for him.

No argument has been made to you that he failed in any respect to play the part of a prudent and careful man in the case which he gave to the wound, so I say nothing more about that.

As a part of his damages, he would be entitled to recover what he reasonably and necessarily expended in the care of the wound and in recovering from it. That is a question of fact for you to find. It would not make any difference, of course, whether he had actually paid the bills, or whether he had simply incurred them and would have to pay them hereafter. The question for you would be what he had reasonably and necessarily incurred by way of such bills.

80 It would be for you to decide what was the reasonable charge on the part of these physicians who attended him. They would not absolutely fix it, or make it contingent upon the verdict, or anything of that sort. You should allow what he reasonably and necessarily incurred by way of such expenses.

Then he would be entitled to be reimbursed for them.

No argument has been made about any loss of time in the Government service, so that I say nothing about that; but he is entitled, in addition to these expenses, to recover for whatever he suffered, for the inconvenience, the pain, the natural apprehension, if such there was, resulting from the injury. You are to consider the testimony bearing upon the subject, the testimony which comes from the plaintiff himself and from his physicians, and as sensible men of common experience in life you are to put yourselves, in imagination, in his place, and in that way determine, as best you can, what he went through. Then you are to estimate as best you can, in damages what he ought to receive by way of compensation, what will fairly pay for it.

You are entitled, if you find for the plaintiff, to award him just such damages as, in your good judgment, you think should be awarded to him to compensate him, not exceeding the amount named in his declaration. Anything up to that sum is entirely within your judgment, whether it is $3,000 or any less sum, fairly within the evidence.

Are there any special suggestions to be made?

Mr. McKENNEY: I did not quite catch the "if" in the

81 latter part of your Honor's charge. I do not know whether you charged that if they find for the plaintiff they can find thus and so.

The COURT: Of course this is only in case you find the other points here, as to the contract, the breach of the contract and the plaintiff's carefulness—all of these other matters. You are not to come to the question of damages at all unless you find them in the plaintiff's favor. The burden is upon him on all those points.

Mr. McKENNEY: If your Honor please, is it in order to note exceptions to portions of the charge at this time?

The COURT: You may have them noted now.

Mr. McKENNEY: I want to note an exception to so much of your Honor's charge as stated to the jury, that there was evidence before them tending to show that the parties to this case had entered into the contract set out in the declaration.

The COURT: Yes.

Mr. MCKENNEY: There is one other point in the charge as to the measure of the duty of the defendant. At one point in your Honor's charge you stated, as I understood you, that there was nothing here to warn him—referring to the plaintiff—and the defendant failed to provide a safe place.

The COURT: I think you misunderstood me. I will clear up that if there is any doubt about it.

Mr. MCKENNEY: I wanted to call your Honor's attention to it, because I understood a subsequent portion of your Honor's charge to be otherwise.

82 The COURT: I do not mean to tell the jury, as matter of law, that the defendant did not warn the plaintiff. His testimony tends to show that he warned everyone who came down there. That is for you to say. Although the place was not safe, yet if the plaintiff was warned of his danger and then went on and carelessly inflicted the injury upon himself, of course the defendant is not liable for it.

As to its being an unsafe place, I said that the defendant admits that himself. He says he knew it was unsafe, and that is why he took the precautions he did take, because he did not want anyone to be hurt.

Now, as to the duty incumbent upon him, knowing that it was an unsafe place, I should have said another word to you, and that is that if he did give instructions to his employees to warn people there, and they did not carry out his instructions, he would be liable just as much as if he had failed to do it himself; because, if he entrusted that duty to his agents, he is responsible if they do not carry out his instructions. It would show his good faith in the matter, if he told them to do it, and you would feel as though you would not blame him so much as if he had not given those instructions; but still he would be liable, if instructions and warnings were necessary, to see that they were given, at his peril.

You make take the case.

And thereupon, at the conclusion of all of the foregoing, the jury retired to consider of their verdict, and having sufficiently
83 considered thereof, the jury in open court on, to-wit, the 9th day of December A. D. 1908, returned their verdict in favor of the plaintiff DuBois and against the defendant Wickersham in the sum of fifteen hundred dollars ($1,500.00).

Wherefore, in order that all of the foregoing which would not otherwise be or appear of record in this cause may be made both so to be, and to appear, this bill of exceptions is settled, signed and ordered to be filed and made of record this 30th day of April A. D. 1909.

WENDELL P. STAFFORD,
Associate Justice Supreme Court
of the District of Columbia.

Directions to Clerk for Preparation of Transcript of Record.

Filed April 30, 1909.

In the Supreme Court of the District of Columbia, the 30th Day of April, 1909.

At Law. No. 49773.

DuBois
vs.
Wickersham.

The Clerk of said Court will prepare transcript of record to consist of the following: Declaration; Notice to plead; Plea; Joinder of Issue; Notice of Issue; Verdict; Motion for new trial as amended; Judgment; Opinion of Court; Order for appeal and citation; Citation; Memo: Deposit of $100. in lieu of appeal bond and supersedeas bond; Orders extending time to settle Bill of Exceptions; Bill of Exceptions.

WILLIAM HITZ,
Attorney for Defendant.

United States of America,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 83 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49773 at Law, wherein Charles L. DuBois is Plaintiff and Turner A. Wickersham is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of May A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2023. Turner A. Wickersham, appellant, *vs.* Charles L. DuBois Court of Appeals, District of Columbia. Filed May 13, 1909. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2023.

TURNER A. WICKERSHAM, APPELLANT,

vs.

CHARLES L. DUBOIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Pleadings.

August 30, 1907, Charles L. Dubois, the appellee here, filed his declaration in the court below against Turner A. Wickersham as sole defendant, averring that on the first day of September, A. D. 1906, and for a considerable time prior thereto, the defendant (Wickersham) maintained a bathing beach at Chesapeake Beach and for a valuable consideration to be paid by prospective bathers undertook to

maintain said bathing beach and everything under the waters thereat in a safe and proper condition so that persons contracting to enter said bathing beach and to bathe therein might do so safely and without injury or damage; that on said September 1, 1906, the defendant Wickersham for the lawful and sufficient consideration of twenty-five cents contracted and agreed with him (Dubois), that he (Dubois) might enter upon said bathing beach and bathe in the waters thereof safely and without injury or damage; that *pursuant to said contract and agreement,* he (Dubois) went upon said bathing beach and into the waters aforesaid, and, in so doing, without negligence on his part, stepped upon the jagged and splintered end of a certain post, or stake then beneath said waters, "which said post or stake, without the knowledge of the plaintiff (Dubois), was by the defendant (Wickersham) then and there improperly, wrongfully and negligently left, allowed and permitted to so remain as aforesaid, and in the condition aforesaid;" whereby plaintiff's foot was bruised, wounded, and cut and blood poisoning was caused and plaintiff was prevented from carrying on his ordinary occupations and suffered pain, expense and damage; "all of which pain, suffering, injury and damage were suffered by the plaintiff (Dubois) without any fault or negligence on his part, but were occasioned by the fault and negligence and improper and wrongful acts and omissions of the defendant" (Wickersham), to the loss and damage of plaintiff in the sum of three thousand dollars ($3,000.00) (R., 1-2).

October 9, 1907, the defendant Wickersham, for plea to this declaration, said that he was "not guilty in the manner and form alleged" (R., 3).

October 17, 1907, the plaintiff joined "issue upon the defendant's plea" (R., 3).

The Trial.

The issue presented by these pleadings came on for trial before Mr. Justice Stafford and a jury.

The plaintiff being sworn as a witness on his own behalf gave evidence tending to prove that he lived in the city of Washington and had been employed for ten years past in the General Land Office of the Department of the Interior. On the first day of September, 1906, same being a Saturday and a half-holiday, he arrived at Chesapeake Beach and went immediately to the bathing houses, where he bought a ticket for twenty-five cents, which "entitled him to the use of a bathroom, towel, and bathing suit at that point." The ticket "on presentation enabled him to go through the gate and get the bathing suit." He gave up the ticket there, was directed to the bathroom, and after putting on a suit went down certain steps on to a platform leading out into the water where people were bathing; there was an enclosure about the bathing place made by a wire fence of some kind; he went to the end of the platform, stepped off to go to the right and in doing so stepped on the jagged remnants of a post which had been broken off; splinters from the broken post made a cut "about half an inch long in the bottom of his left foot." "He sat down to see what had hurt him and felt this post there." He returned to the bathhouse, got a piece of adhesive plaster, put it on his foot and returned to Washington by the first train. On the return journey his foot pained him and he bought antiseptic liniment at a drug store and applied it to his foot that night. In the morning he called in a physician, who dressed the wound and thereafter treated the foot daily for nearly a month, during all of which time he was confined to his bed. Afterwards his family physician, who had been absent from the city, returned and took charge of the case. The wound caused him much pain, made him apprehend the possi-

bility of lockjaw, and made it difficult for him to sleep at night. He was confined to his house until the first of November, walked on crutches until November 19th, and afterwards used one crutch and a cane. He was absent from his office "practically two months altogether," which absence was charged up against his annual and sick leaves. At the date of the accident his salary was $2,400.00 per annum and at no time since had it been less; at the time of the trial it was $2,750.00 per annum. Dr. Buchanan rendered him a bill for $55.00, Dr. Bliss one for $56.00, Dr. McDonald one for $5.00, and Dr. Tufts one for $123.00, the last-mentioned saying that if he (plaintiff) "got any damages she would expect the full bill, but if not she would reduce the rates, for cash payment." He also incurred bills for medicines "amounting to about $15.00" (R., 17).

At the time he was hurt he examined the end of the (broken) post by feeling it with his hand; the water was roily and this (broken) post could not be seen; it was about ten feet from the end of the platform, the splintered top was about two feet under water and the jagged ends projected two or three inches above the surface of the sand. The platform had been broken off and beyond the broken end was the post on which he stepped (R., 18). This post was of the same size as the posts supporting the portion of the platform which still remained, and was in line therewith; on a subsequent occasion he saw several ends of posts in the sand under the water in the direction occupied by the platform prior to the date on which he received his injury. On the day of the accident, while he noticed that the runway (platform) was shorter than formerly, the outer end thereof was not closed or boarded up, and there was no sign or warning of danger to any one who might step off the outer end of said runway" (R., 18).

On cross-examination he testified that no deduction had been made from his salary on account of the time lost as the result of the accident. At the time of the accident he

did not know that Wickersham "was in charge." "He went to the bathing house, paid 25 cents to the attendant at the window and got 'some sort of a check or equivalent for my 25 cents,' which (equivalent) I presented for a bathing suit at the entrance to the bath" (R., 19).

He did not notice the check or ticket at all, and could not say whether it was a brass check or a pasteboard check, but he knew it was something which "I exchanged for a bathing suit."

Being shown a cardboard ticket consisting of two coupons, on one of which was printed "Chesapeake Beach Baths, Admit One. Not Good if Detached," and on the other "Chesapeake Beach Baths. Suit Ticket. Not Good if Detached," and having been asked if the ticket for which he paid his quarter was like that, he replied that he had but a very vague impression about what he received, because he "immediately went around the corner of the gate without looking at it to see what it was, and passed it in for a bathing suit." It was possible "that part of it was given (up) at the gate, and then the other part for the bathing suit." He was inclined to believe that the ticket he bought was the same sort of thing as the one shown to him (R., 19-20).

On the day of the accident his attention was drawn to the fact that a part of the runway (platform) had been carried away at the time he arrived at the end of it, but "there was nobody there to warn people, and no signs that there was any danger around there" (R., 19).

Plaintiff also produced as witnesses Doctors Buchanan and Bliss, who gave evidence as to the character and extent of the injury suffered by him and its medical treatment by them. He also produced two other witnesses (Bond and Fisher), each of whom testified that on September 1, 1906, he bathed at Chesapeake Beach and saw the plaintiff there; each noticed that a portion of the runway had been carried away and each stubbed his foot or toe on submerged stakes

or posts, which were under the water, but were not visible; no one called their attention to the presence of such danger (R., 23).

In the course of his testimony the plaintiff stated that "he went back to Chesapeake Beach once after the day of the accident; could not state the exact date that he went down there, but thought it was the following spring; but could not remember, and it might have been New Year's Day; he went down there on that occasion with a Mr. Fisher" (R., 17).

Fisher testified that on the Thanksgiving Day following this accident he went to Chesapeake Beach with plaintiff, and in that connection the following colloquy occurred:

"By Mr. LEWIN:

"Q. What did you find when you went down there?

"Mr. MCKENNEY: I desire to reserve an exception on this point.

"The COURT: I will note the exception, with great pleasure. He can go ahead first and state what he found there on the day in question.

"Mr. MCKENNEY: That is the day of the accident.

"The COURT: Exactly, the day when he saw this man bandage his foot. * * *

"The COURT: What do you say; did you see any post there?

"A. Your Honor, I did not see the post, because the water was pretty well stirred up.

"By the COURT:

"Q. What did you feel about it? A. I felt the post as I stepped out into the water.

"Q. Describe its location to the jury. A. I turned to the left, as I generally do. I walked out towards the center of the bathing beach, and on the way out I ran my foot against an obstruction.

"Q. That is not describing its location with reference to the end of this runway. Where was it with reference to

that? A. Well, I should judge it was about the second post out.

"By Mr. LEWIN:

"Q. Out from what? A. Out from the end of the broken runway.

"By the COURT:

"Q. Did you, on that day, discover any others? A. No; I kept away from the end of the pier. When I came in, I came out on the side.

"Q. You say you went down there again on the 30th of November? A. Yes, sir.

"Q. Did you look then to see whether there was any posts there? A. There were stubs of posts——

"Q. I say did you look to see whether there were. Just say yes or no to that, first. A. Yes, sir.

"Q. Now, what you further saw is that there was a line of posts there? A. Yes, sir.

"Q. Corresponding to the posts when the runway was standing? A. Yes, sir.

"Mr. MCKENNEY: I desire to note an exception to this.

"The COURT: It will be under exception. You need not describe the condition they were in, but simply state that there were posts there, if there were any.

"By Mr. LEWIN:

"Q. What did you find there when you went down there on your second visit, on Thanksgiving? What did you find there with respect to the bottom of that bathing place? A. There were posts running in pairs from the outside edge of the boardwalk, out to where the runway apparently ended, and at a point of about three sets of posts from the end, apparently at the end of the posts, there was a double post both apparently broken off about four inches from the bottom" (R., 24, 25).

Fred G. Coldren, a witness on behalf of plaintiff and a member of the local bar, testified that several months after the injury complained of by plaintiff he, in company with plaintiff, called upon the defendant Wickersham and talked with him "concerning the Dubois matter." Wickersham

"said that Mr. Flannery was his attorney in this matter," and "in effect that he was the lessee or proprietor of that bathing beach at the time in question; that he was there in charge that day." Witness also produced in evidence a letter from Mr. Flannery to Mr. Lewin which referred to Mr. T. A. Wickersham as "the Lessee of the Bathing Beach" (R., 26).

Plaintiff also introduced in evidence a certified copy of the record of a lease from the Chesapeake Beach Railway Company to Turner A. Wickersham, wherein it was recited that said Wickersham was "desirous of obtaining a lease of the bathing privileges at Chesapeake Beach in the State of Maryland, including the right to erect, maintain and operate bathhouses and their necessary appurtenances," and the Railway Company was willing to lease to him "such privileges and rights upon the terms and conditions hereinafter set forth;" and that in consideration of the premises the Railway Company, for a specified term of years, leased and granted unto said Wickersham "the exclusive privilege of erecting, operating and maintaining bathhouses and their appurtenances at, on, or near the water front of Chesapeake Beach upon certain specified conditions, among others, that said Wickersham should erect such number of bathhouses as may be necessary to supply the reasonable demands of visitors and others at Chesapeake Beach, and would suitably equip and maintain the same and pay to the company a specified percentage of the gross proceeds derived from the operation of the bathhouses and the business conducted therein" (R., 28).

Defendant Wickersham, in his own behalf, testified "that he was the lessee and manager of the Chesapeake Beach Baths at Chesapeake Beach, Maryland, on the first day of September, 1906." That for two or three days prior to that date "a storm had occurred and continued at said Beach," and on the night of Friday, August 31, 1906, had "washed

away a portion of the platform which extended out into the water from the bathhouses" (R., 29). When he found that the portion of the platform had been carried away "he knew that some of the stakes formerly supporting the same remained in the *sand*, and he therefore instructed one of his employees, Elijah Adams, to nail boards across the outer end of the remaining portion of the platform so that any one going into the water would have to get off the platform on either side, and thus be prevented from getting on those stakes;" he stood near by and "saw Adams nail the boards across the end of the runway, this being done on Saturday morning, and before any one had gone in there;" he knew there must be broken stakes in the line of the runway, but the high tide and heavy southeast wind then prevailing brought the water a foot over the floor of the platform and made it impossible to inspect the bottom of the beach or to do anything about the stakes at that time;" he instructed his office force to "caution all bathers to be careful and not get inside the line of the runway," and "throughout the afternoon he stood in a pavilion about two feet above the heads of persons going out on the platform into the water and cautioned everybody who went out to keep to the right or left and not to go into the line of the broken platform." The form of ticket, above exhibited, was "just exactly such a ticket as we sold at that time" (R., 30). He did not claim or exercise any exclusive right in respect of bathing in the immediate vicinity of this platform;" he "placed said platform and enclosure there"—"the enclosure consisted of a wire screening to keep out sea nettles;" many persons bathed within the wire screen who did not pass through his bathhouses (R., 31).

Adams, Jenkins, Joyce, Smith, Calver, and Miss Bagnan, employees of defendant performing duties at the Chesapeake Beach Baths on the day in question and immediately prior

thereto, gave testimony corroborating that of defendant (R., 31-34).

In rebuttal plaintiff adduced evidence tending to prove that on the day in question "the end of the platform was not boarded up, but was all open," and "that no warning of danger was given to him or to any one in his hearing by any person at the beach" (R., 35, 36).

At the conclusion of all of the evidence, same being fully preserved in the bill of exceptions, counsel for defendant moved the court to instruct a verdict for defendant on the grounds that—

1. Wickersham had not been sufficiently connected with the *locus in quo*.

2. That no evidence had been submitted in proof of the contract nor of the breach of duty alleged in the declaration.

This motion was overruled by the court and exception was duly noted (R., 37).

Thereupon the court instructed the jury in pertinent part as follows:

> "Your oath requires you to try the issue presented in each case. * * * The first thing to do, in all cases that come before you, is to find out exactly what the question is that you have to determine. It is the duty of the court to point that out to you very clearly. * * * In this case the plaintiff has brought an action upon a contract which he claims was entered into between him on the one part and Mr. Wickersham on the other part; that that contract was broken by Mr. Wickersham, and that he, the plaintiff, was damaged by reason of its being broken, so that he ought to recover these damages.
>
> "Consequently, there are four questions in this case: First, whether a contract was entered into; second, whether it was broken; third, whether the

plaintiff was damaged, and fourth, if he was damaged, how much.

"Suppose then that we take these questions up. What is the contract which the plaintiff claims was entered into? He says—not to go into the particulars of the declaration—that at the time in question the defendant was maintaining a bathing beach and undertook to maintain it; that he undertook to furnish that as a bathing place for those of his customers who chose to come and pay the requisite fee, and that as a part of that contract he undertook to give them a safe place in which to bathe. Then he says that he, the plaintiff, came there as one of the customers to patronize that establishment, and paid his quarter, the required fee, and went in to bathe. * * * But, he says, * * * the place was unsafe by reason of this post that was left there, and that without any carelessness on his part he stepped upon it and was injured (R., 37).

"He says that it was a breach of this contract, on the part of the defendant, to allow that post to be there in that way. * * *

"I submit to you, as a question of fact, upon all of this evidence, whether the two parties here did enter into the contract described in this declaration. There is evidence tending to show that they did, and if you are satisfied by the fair balance of the testimony, that they did enter into that contract, then that part of the case is made out.

"There is some evidence here tending to show that Mr. Wickersham did not absolutely control the territory within this wire fence; that others came in there who did not come through his gate. I charge you that it is not necessary that he should have had the absolute control of that tract of land or beach. * * * The question, on that point, is whether he invited his customers to come there and go down into the water at that time to bathe, within that enclosure; and if he received a fee therefor, in consideration of their privilege to do that, whether he had the right to give them the privilege or not is of no consequence, if he in fact undertook to do it.

"The bath houses, it is conceded, were there, the

runway was there. * * * Was it a part of the understanding between the defendant and those who came there, like the plaintiff, to bathe, that they should or might go down there upon that runway and out into the water, and step off from it into the water to bathe in this enclosure? * * *

"If so, then that part of the case would apparently be made out. * * * (R., 38.)

"If the plaintiff went down there and went in there not as a trespasser, then he came in under this contract. If he paid his fee and was furnished with a ticket and went in with the others, then he came in under that contract and is a party to it. * * *

"If you are satisfied by the fair balance of the testimony that he did go down there and did go there as a customer then that point is settled.

"It is admitted, practically, that this was an unsafe place at that time, immediately after that runway was removed.

"Mr. Wickersham said * * * he knew it as well as one could know anything he had not seen; he knew * * * that there must be posts which had been broken off there, and which would be dangerous, and he says because he knew it he took the steps which he did take to guard customers against injury.

"So that two questions would seem to arise right there. In the first place, was the plaintiff careless? * * *

"Mr. Wickersham says that he was there on that day and notified everybody who came down of the danger. If he did, if this man came down, he notified him. It is for you to say * * * whether this man did receive a notice from Mr. Wickersham or anyone else, so that he knew of the danger there was at that place. If he did, and was himself careless about it, no claim is made that he would be entitled to recover.

"But if he was not in any way careless and received his injury in stepping down upon a stake which anyone must admit was something that made the place dangerous at that time, and if there was nothing to warn him to keep away from that point—I say that

if he was not at all careless about that—that part of the case would seem to made out, namely, that the defendant had failed to provide a safe place (R., 39).

"* * * It is often possible for impartial triers of questions, whether a court or a jury, to reconcile testimony, upon the theory that all of the parties who have testified have intended to tell the truth, but are mistaken for one reason or another. Counsel in the case may be too zealous to look upon the testimony in that way, and yet an impartial trier of the facts may be able to see how the fact was, and yet that nobody had intended to state the thing falsely. * * *

"* * * Mr. Wickersham thinks and says that the storm took a part of the runway out on Friday night, and the other witnesses agree with him. He says he had the runway boarded up the next morning. Are you satisfied about that? Do you think from the evidence, that he is surely right about that, or was it, perhaps, at some later time, the next day possibly, when that was done?

"I am not suggesting this to you as my view of the testimony at all, but that you should have all these things in mind. They are merely by way of illustration, to see if the testimony of the parties may be reconciled on the theory that they are honest but mistaken, on one side or the other (R., 40).

"* * * It is always the duty and the pleasure of triers of questions of fact, if they reasonably can do so, to reconcile the testimony on some theory that will preserve the honesty of the witnesses. They are not to find that some witness has testified falsely, unless that seems to be necessary. If the evidence can be reconciled on the theory that they are mistaken, that is always the better theory to adopt, where it is reasonable.

"If you are satisfied that the contract was entered into between these parties, that the plaintiff fulfilled it on his part by the exercise of due care, and that the defendant broke it on his part by failing to exercise due care in making the place safe, or in not properly warning the people who came there to bathe while it was unsafe, and if you are satisfied that the plaintiff received his injury by reason of this breach of the con-

tract, on the part of the defendant, then the question would be how much was he injured, and you would have to take up the question of his injuries (R., 41).

* * * * * * *

"No argument has been made about any loss of time in the Government service, so that I say nothing about that; but he is entitled, in addition to these expenses, to recover for whatever he suffered, for the inconvenience, the pain, the natural apprehension, if such there was, resulting from the injury. You are to consider the testimony bearing upon the subject, the testimony which comes from the plaintiff himself, and from his physicians, and as sensible men of common experience in life you are to put yourselves, in imagination, in his place, and in that way, determine, as best you can, what he went through. Then you are to estimate as best you can, in damages what he ought to receive by way of compensation, what will fairly pay for it.

* * * * * * *

"Mr. McKENNEY: I did not quite catch the 'if' in the latter part of your Honor's charge. I do not know whether you charged that *if* they find for the plaintiff they can find thus and so.

"The COURT: Of course this is only in case you find the other points here, as to the contract, 'the breach of the contract and the plaintiff's carefulness—all of these other matters. You are not to come to the question of damages at all unless you find them in the plaintiff's favor. The burden is upon him on all those points.

* * * * * * *

"Mr. McKENNEY: I want to note an exception to so much of your Honor's charge as stated to the jury that there was evidence before them tending to show that the parties to this case had entered into the contract set out in the declaration (R., 42).

"The COURT: Yes.

"Mr. McKENNEY: There is one other point in the charge as to the measure of the duty of the defendant. At one point in your Honor's charge you stated, as I understood you, that there was nothing here to

warn him—referring to the plaintiff—and (that) the defendant failed to provide a safe place.

* * * * * * *

"The COURT: I do not mean to tell the jury, as a matter of law, that the defendant did not warn the plaintiff. His testimony tends to show that he warned everyone who came down there. That is for you to say. Although the place was not safe, yet if the plaintiff was warned of this danger and then went on and carelessly inflicted the injury upon himself, of course the defendant is not liable for it.

"As to its being an unsafe place, I said that the defendant admits that himself. He says he knew it was unsafe, and that is why he took the precautions he did take, because he did not want anyone to be hurt.

"Now, as to the duty incumbent upon him, knowing that it was an unsafe place, I should have said another word to you, and that is that if he did give instructions to his employees to warn people there, and they did not carry out his instructions, he would be liable just as much as if he had failed to do it himself; because, if he entrusted that duty to his agents, he is responsible if they do not carry out his instructions. It would show his good faith in the matter if he told them to do it, and you would feel as though you would not blame him so much as if he had not given those instructions; but still he would be liable, if instructions and warnings were necessary, to see that they were given, at his peril.

"You may take the case."

The jurors having considered of their verdict, returned into court and said that "they find the issue aforesaid in favor of the plaintiff and assess his damages, by reason of the premises, at fifteen hundred dollars ($1500.00)" (R., 4).

Subsequently, and within the time limited by the rules of practice, the defendant, by his attorneys, filed in the cause a motion to set aside the verdict and to grant a new trial.

Among other grounds of said motion duly assigned were the following:

Said verdict is contrary to law;

Said verdict is * * * not supported by the evidence;

Because the verdict is the result of prejudice in the minds of the jury, adverse to the defendant, and resulting from the rulings of the court on the admission of evidence;

Because of prejudice in the minds of the jury resulting from remarks in the charge of the court regarding the general duty of the jury in all cases to reconcile the testimony of all witnesses if possible (R., 5-9).

This motion, having been fully argued on the 14th day of December, 1908, was by the court on the 24th day of February, 1909, overruled, the court delivering an opinion and order in the following words, viz:

> "The defendant was a keeper of a bathing beach with bath houses and the plaintiff undertook to bathe thereat. In doing so he stepped upon a stake standing upright under the water and punctured his foot receiving a severe injury. He brought this action to recover damages. He framed his declaration in such a way that it is not easy to determine whether it should be treated as a declaration in contract or in tort. After setting out that the defendant was maintaining a bathing beach for hire and that on the day named the defendant, for the consideration of twenty-five cents, contracted with the plaintiff that the plaintiff might go upon the beach and bathe in the waters there, 'and do all of these things safely and without injury or damage,' he alleges that the plaintiff in pursuance of said contract did go upon the beach and into the waters, and without any negligence upon his part injured himself as before stated, and further alleges that said stake had been 'improperly, wrongfully, and negligently left' in the place where it was by the defendant. This clearly states a contract, and, although it does not directly and positively allege a breach of the contract it does allege what apparently amounts to a breach by way of inference; that is to

say, it does not allege that the defendant might not have safely bathed, but alleges that he did not safely bathe, although free from negligence himself. On the other hand the declaration may be treated as sounding in tort and as setting out the contract relation between the parties merely for the purpose of showing that the defendant owed the plaintiff a certain duty. It is in keeping with the view that the count is in tort, that it contains the allegation that the plaintiff was free from negligence, and that the defendant was guilty of negligence, for neither of these elements is noticed in the statement of the contract. It being possible to treat the declaration as either in contract or in tort, it seems fairer to both parties and especially to the pleader to treat it as in tort for then all the allegations are pertinent and proper and none need be rejected as surplusage. The case was submitted to the jury in language strongly and consistently indicating that the declaration was in contract, but the jury were required to find all that it would have been required to find if the declaration had been treated as in tort. It found that the defendant was the keeper of the beach and invited the plaintiff to bathe there and contracted with him that he might bathe there in consideration of the fee received by the defendant from the plaintiff; that the plaintiff was free from negligence in the use he made of the place; that the defendant was guilty of negligence in allowing the stake to remain where it was and in failing to warn the plaintiff of the danger, and that the plaintiff's injury resulted directly from such negligence on the part of the defendant. These facts all having been found in the plaintiff's favor, as they must necessarily have been found under the instructions, the question is whether the verdict should be set aside and a new trial ordered merely because the declaration might have been treated as a declaration in contract, and because the court referred to it as a declaration in contract in its charge to the jury. The defendant says that he was, as a matter of law, misled in that he was notified by the declaration that he was sued in contract and that such contract was claimed to be an absolute guaranty on his part that the bathing place was safe, whereas the case was sub-

mitted to the jury on the theory that the contract claimed was not that the defendant absolutely guaranteed the safety of the beach, but only undertook to use reasonable care to see that it was safe. It should be noted that the defendant pleaded to this declaration as a declaration in tort, that is, he did not plead non-assumpsit, but did plead not guilty. In view of the allegations of negligence, which would have been entirely superfluous and impertinent in a declaration upon contract, and in view of the form of the defendant's plea, it seems to the court that there can be little reason to suppose that the defendant was in fact misled or surprised. The case was submitted to the jury in a way more favorable to the defendant in respect to the duty incumbent upon him than if it had been submitted upon the theory of an absolute guaranty, because the jury were told that in order to find against the defendant they must find not merely that the place was unsafe, but that it was unsafe through the defendant's failure to exercise reasonable care. It is admitted by the defendant's counsel that this is the law of the case upon the facts shown, and it seeming clear to the court that it is also the law of the facts as alleged in the declaration, when the declaration is treated as in tort, as the defendant's counsel themselves treated it in pleading to it, the court is unable to find any substantial reason for granting the motion upon the ground of variance. Needham *vs.* Pratt, 40 Ohio St., 186, is a case worth noting in this connection. The plaintiff sued the defendant upon an account and the defendant attempted to plead in off-set a breach of warranty independent of the subject-matter of the plaintiff's action, and alleged that the representations constituting the warranty were not only false, but were known by the plaintiff to be false, and were made with intent to defraud the defendant. The question was whether the defendant could use this matter in off-set in view of the allegations of fraud. When stripped of those allegations the answer constituted a good cause *ex contractu*. The court held that the answer might be treated as in contract and the allegations of fraud disregarded. So in the present case, if the declaration may be treated as either

in contract or in tort it should at this time be treated as in tort for the reasons given.

"The only importance of the contract in the declaration is to show the relation between the parties from which sprang the duty of the defendant to use reasonable care in keeping the place safe. This duty did arise by reason of the fact that the defendant was inviting the plaintiff, with others, to use the place for bathing. There was no necessity that there should be an express agreement on the part of the defendant to keep the place safe. It was his duty under the law to use reasonable care to that end. Consequently an action of tort was maintainable under the test laid down in Atl., &c., R. R. Co. *vs.* Laird, 164 U. S., at 399. 'The distinction is this, if the cause of complaint be for an act of omission or nonfeasance, which without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the count is founded upon contract and not upon tort. If on the other hand the relation of the plaintiff and the defendant be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the count is one of tort.'

"There can be no doubt that the relation between the keeper of a bathing beach and a bather is such that the duty arises upon the part of the keeper to use reasonable care to provide a safe place, whether any special contract covers the point or not. The declaration in this case shows the relation to have existed and the duty to have existed and it alleges a breach of that duty saying nothing about any breach of contract as such. For the foregoing reasons the motion for a new trial on the ground that the verdict is contrary to law must be overruled.

"The defendant also moves for a new trial on the ground that the verdict is the result of prejudice in the minds of the jury adverse to the defendant resulting from the rulings of the court on the admission of evidence, and refers in support thereof to two incidents of the trial when the court directed one of the

counsel for the defendant to be seated. A stenographer was employed by the defendant who has made a transcript of his notes and that transcript is referred to in argument in support of the motion. It shows all that a transcript can be expected to show and naturally does not show the very thing which moved the court to give the direction complained of. As it seemed to the court at the time it was necessary to require the counsel to be seated in order to avoid an unseemly occurrence in the courtroom. The tone of voice, the attitude, the facial expression of the counsel were of such that if they had been ignored at the time the court would have practically abdicated and left the management of the trial to the counsel. Now that weeks have elapsed since the occurrence and after long reflection upon the incident the court is still of the opinion that it was necessary to give the direction which was given, but the court is not satisfied that it was free from blame in the matter which led up to the incident. It is inclined to think that if its own attitude towards the counsel had been more gentle and equable up to a certain point the necessity would not have arisen. It is ready to believe that the counsel had no deliberate purpose to assume a disrespectful attitude. The court is entirely satisfied that the verdict of the jury could not have been influenced in any degree by this incident and that whatever may be said of it does not constitute a ground for a new trial.

"It is urged that the verdict is excessive in amount, but with this contention the court is unable to agree.

"The motion for a new trial is accordingly overruled" (R., 9-12).

On the last-mentioned date judgment on the verdict in favor of plaintiff for the sum of $1,500, with interest from said date and costs of suit, was duly entered of record (R., 12).

ASSIGNMENTS OF ERROR.

1.

It was error to charge the jury that there was evidence tending to show that the defendant had contracted with plaintiff as set forth in plaintiff's declaration.

2.

It was error to charge the jury that if plaintiff paid his fee and was furnished with a ticket and went in bathing at the place in question then he went in under that contract, whereby among other things defendant undertook to give his customers a safe place in which to bathe.

3.

It was error to charge the jury that the place in question was admitted by defendant to be an unsafe place immediately after the runway was removed, and that if plaintiff, not being himself careless, received his injury in stepping upon a stake which made the place dangerous at that time, there having been no warning given him to keep away from that point, then "defendant had failed to provide a safe place," and "that part of the case would seem to be made out."

4.

Having charged the jury that the cause of action laid by the plaintiff consisted in the alleged failure on the part of defendant to fulfill the specific duty imposed upon him by the special contract, viz: to furnish plaintiff with a safe place where to bathe—and the case having been submitted to the jury for its verdict upon that theory, it was error to hold, notwithstanding a material variance between the pleadings and the proofs, which, upon that theory, would necessitate

a *venire de novo,* that, nevertheless, the verdict should be retained and judgment given thereon for plaintiff because perchance the trial might have proceeded upon the theory that the cause of action arose, *ex delicto,* from the negligent failure of defendant to observe a duty imposed by general law, and if it had been so tried the admitted variance between the pleadings and proofs would have been immaterial.

5.

Having expressly charged the jury that the cause of action arose *ex contractu* and involved the alleged breach by defendant of the specific duty imposed upon him by the terms of the contract described, it was error to uphold the verdict of the jury and to enter judgment thereon, notwithstanding the failure of any proof tending to establish the existence of such contract or the assumption by defendant of such duty.

6.

The case having been tried and submitted to the jury upon the theory that the issues involved arose *ex contractu,* it was error to sustain the verdict and enter judgment thereon on the theory that by rejecting as surplusage the averments of the declaration as to the special contract described, the remaining terms of the pleading presented a satisfactory cause of action *ex delicto,* and the proofs were sufficient to justify a finding by the jury that the defendant had failed to perform the duty imposed by general law upon persons in his supposed situation, *i. e.,* upon a bathing beach proprietor.

7.

Under the theory upon which the case was tried to the jury it was error to refuse to instruct the jury that the defendant had not been sufficiently connected with the point

or place where the alleged injury was received to render him liable to respond in damages to plaintiff.

8.

It was error to permit the witness Fisher to testify as to his stubbing his own toe, and as to what he saw on the occasion of his visit to the beach subsequent to the date of the accident to plaintiff.

9.

It was error on the part of the learned trial justice to overrule the motion to set aside the verdict and grant a new trial.

ARGUMENT.

Conceding, as stated by the learned trial justice in the course of his opinion on overruling the motion for a new trial (R., 9), that plaintiff's declaration is so framed that "it is not easy to determine whether it should be treated as a declaration in contract or in tort," nevertheless, as both parties treated it as in contract, and the entire trial proceeded upon that theory, and the trial justice, without objection from either side, expressly charged the jury that it was so, and each of the issues submitted to and passed upon by the jury was contractual in character and quality, the question at once arises whether in the event of the verdict of the jury upon such issues and under such theory being bad in law, it may nevertheless be retained and made the basis of a valid judgment, because forsooth the proofs adduced on the trial while insufficient to support the action *ex contractu* were in themselves sufficient to have supported a verdict in favor of plaintiff had the cause of action been declared upon as *ex delicto*.

The issues submitted to the jury, as expressly formulated and declared in the course of the charge of the court, without objection from either party, were:

1. Whether the contract set forth in plaintiff's declaration had in fact been entered into between the parties;

2. If so, whether it was broken by the failure on the part of the defendant "to provide a safe place" where plaintiff could have bathed without injury or damage;

3. If so, whether plaintiff, by reason of this breach of the contract on the part of the defendant, received the injury complained of;

4. If so, what amount was the damage.

The verdict of the jury, if valid at all, was responsive to these issues and to no others, for no other or different issues were submitted to its determination. If for any reason good in law the verdict upon such issues was bad and ought to have been set aside, the refusal of the trial court so to do constitutes reversible error, for the verdict on the issues submitted being bad, it cannot become good, because under a different theory of the case narrower issues might have been submitted to the jury, and the errors apparent might have thus been avoided.

In other words, the learned trial justice in overruling the motions of the defendant to instruct the jury and for a new trial declared in effect that although the plaintiff had failed by proofs to make out the cause of action understood to have been laid in the declaration and upon which the trial proceeded, nevertheless the jury having erroneously found that the defendant had breached a special contract to observe a particular duty towards the plaintiff, their verdict, in view of the tendency of the proofs, could be construed to be a finding that the defendant had negligently failed to observe

the obligations which the general or common law imposes upon persons in his situation, although no such issue was submitted to its determination.

The issues as to whether defendant was the keeper of a common bathing beach, and whether he had failed to perform the duties which the general law imposed upon one in such situation, and particularly whether he had failed to perform the supposed duty to exercise ordinary and reasonable care to make and keep his premises reasonably safe for customers resorting thereto, were neither submitted to nor considered by the jury. The verdict was not responsive to any such issues and ought not to have been retained upon the theory that if such issues *in specie* had been submitted to the jury they would necessarily have been found for the plaintiff.

The Constitution of the United States guarantees to the defendant in this case the right of a trial by jury, and also that he shall not be deprived of his property without due process of law. To affirm the judgment of the court below in the absence of an issue tendered and verdict found thereon condemning defendant of negligent failure to fulfill the obligation of a duty imposed upon him by some general law would be to deny him the right to have such issue determined by a jury, and consequently to deprive him of his property without due process of law.

It does not fulfill the requirements of either due process of law or of its orderly and acceptable administration to say that although the case was submitted to the jury "in language strongly and consistently indicating that the declaration was in contract," nevertheless "the jury were required to find all that it would have been required to find if the declaration had been treated as in tort."

It has long been settled that—

> "When the plaintiff's right consists in an obligation on the defendant to observe some particular duty,

> the declaration must state the nature of such duty, which we have seen may be founded either on a contract between the parties, or on the obligation of law, arising out of the defendant's particular character or situation; *and the plaintiff must prove such duty as laid, and a variance (in actions for torts) will, as in actions on contracts, be fatal.*"
>
> Chitty's Pleading, 13 Am. Ed., vol. 1, p. 388.

> "In an action on the case, founded on an express or implied contract, as against an attorney * * * innkeeper or other bailee, for negligence, &c., the declaration must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of a contract, though in an action *ex delicto,* may be as fatal as in an action in form *ex contractu.*"
>
> Chitty's Pleading, *ib.,* 383.

And it has been said that although not of the gist of the action a contract set out in a declaration must be proved as alleged unless the whole of it is so impertinent that it may be struck out as mere surplusage.

Main *v.* Bailey, 15 Connecticut, 298.

> "In an action on the case under the plea of not guilty the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, * * * but may also give in evidence any justification or excuse."
>
> Chitty's Pleading, 13th Am. Ed., Vol. 1, p. 490.

The action of the trial court in retaining the verdict, notwithstanding the instructions upon which it was based, assumed a material fact as proved, of which there was no evidence in the cause, is at variance with the rules of established procedure governing such matters, and is particularly open to objection because the erroneous assumption of fact so infected the verdict that it could not have been sustained had

the trial court adhered to the theory of the case which controlled the form and manner in which it was submitted to the jury.

Chaffee *v.* Boston Belting Co., 22 Howard, 216.

While under the instruction given the jury might have found, and probably did find, that the defendant maintained a place to which persons occupying a special contractual relation with him might resort for purposes of bathing, it does not follow that the general verdict returned pursuant to such instruction necessarily involved a finding that the defendant maintained a common bathing beach, to which all persons might resort, and upon the payment of the specified price might bathe under the protection as to duty imposed by the general or common law upon the keepers of such resorts. Again, the very testimony of the witnesses might, and perhaps necessarily would, have assumed a different aspect if the case had been treated as in tort rather than in contract. For instance, the evidence of the defendant Wickersham to the effect that although he knew of the damage to the platform in question, and of the probability that there would be broken stakes in the line of the runway, nevertheless "the high tide and heavy southeast wind then prevailing brought the water a foot over the floor of the platform and made it impossible to inspect the bottom of the beach or to do anything about the stakes at that time," which piece of evidence was passed over without comment by both court and counsel as immaterial under the issue as to whether defendant had failed to perform the specific duty alleged to have been imposed upon him by the special contract declared upon, could and would have been urged upon the jury and possibly would have been considered by it as satisfactorily overcoming any testimony tending to prove a failure on the part of the defendant to comply with the common-law duty of bathing beach proprietors to use reasonable care and prudence to so maintain and manage their resorts that they might be made "reasonably safe" for visitors.

As already stated, when the plaintiff's right to recover consists in an obligation on the part of the defendant to observe some particular duty, the declaration must state the nature of such duty, whether the same be founded on contract between the parties or on the obligation of law arising out of the defendant's particular character or situation, *and the plaintiff must prove such duty as laid, and a variance in actions in tort as well as in actions on contracts will be fatal.*

In the light of this well-settled principle of procedure the suggestion made by the learned trial justice that the jury, under the verdict returned, might be considered as having found "that the defendant was guilty of negligence in allowing the stake to remain where it was and in failing to warn the plaintiff of the danger, and that plaintiff's injury resulted directly from such negligence on the part of the defendant," in the presence of exceptions duly noted (and it must be assumed that if the case had been tried in tort on any such theory as to the duty imposed by the general law upon a bathing beach keeper), would necessitate the reversal of the judgment, because the duty which the law imposes upon keepers of bathing beaches is merely to use reasonable care and prudence to make and keep such places safe. The law does not impose upon such keepers an absolute duty to remove from the waters possible dangers or obstructions, irrespective of whether such removal was capable of performance under existing weather conditions or not.

The plaintiff having based his right to recover upon the wrongful and negligent permitting by defendant of a certain stake with jagged and splintered end to remain beneath the waters of the bathing beach, contrary to his alleged specific contract to provide the plaintiff with a safe place where to bathe, whether the declaration be considered as in contract or in tort, the breach alleged consisted in defendant's failure to perform the particular duty imposed upon him by a specific contract, the existence of such contract being alleged but not

proved. The jury having been specifically instructed that the first question for them to consider and determine was as to whether the contract alleged had in fact been entered into between the parties, although there was no evidence to support such a finding, it would seem hardly in accord with "due process" or the due administration of law to found a judgment in favor of plaintiff upon such verdict upon the theory that "the only importance of the contract in the declaration is to show the relation between the parties from which sprang the duty of the defendant *to use reasonable care in keeping the place safe,*" no such duty having, in fact, been averred in the declaration as springing therefrom, although possibly the existence of such duty under established law might be implied from the facts which the statements of the witnesses made in evidence tended to prove. While it may be true that to hold a keeper of a bathing beach liable to one properly frequenting his resort, and suffering injury as the result of the former's failure to exercise reasonable care to make and keep the place reasonably safe, it would not be necessary to aver or prove an express agreement on the part of the defendant to comply with the obligation and duty which the law laid upon him by reason of his occupation; nevertheless, if an express agreement be averred and the fault complained of be the negligent failure to comply with the particular duty alleged to spring therefrom, such alleged duty differing either in degree or kind from the duty imposed by general law, the failure to prove such agreement, as well as the failure to perform such duty, would result in plaintiff's defeat.

While it may readily be admitted that under established law the relation between the keeper of a bathing beach and a bather gives rise to the duty on the part of the keeper to use reasonable care to provide a reasonably safe place where to bathe, and this irrespective of whether there be any special contract covering the point or not, nevertheless it would seem to be unduly straining well-known forms of expression to say that the declaration in this case alleges such a relation

and corresponding duty to have existed between the parties to this case, or indeed that it alleges a breach of any common-law duty, or indeed any breach of duty except that alleged to have been imposed by the special contract described.

It is true that the declaration declares that for a valuable consideration the defendant at the time of the accident to plaintiff and for a considerable time prior thereto had maintained a bathing beach at Chesapeake Beach, and that he undertook "to maintain said bathing beach and everything under the waters thereat and thereon in a safe and proper condition, so that persons contracting to enter said beach and the waters thereof and to bathe there might do so safely and without injury or damage." The obligation of defendant thus stated was clearly in excess of any duty imposed upon a bathing-beach proprietor by the general or common law. Having declared for the breach of a particular duty imposed upon defendant by the terms of a special contract, due administration of the trial required the plaintiff not only to prove the existence of such contract, but also the breach of the particular duty as laid, and mere proof of facts which in the eye of the law could only give rise to a breach of a lesser degree of duty would constitute a fatal variance.

In the declaration before us, in addition to the general averments as to the situation of the defendant and the obligation which he assumed by reason thereof with respect to bathers generally, the plaintiff *ex industria* declared that upon the occasion in question the defendant for a stated consideration specially contracted and agreed that he, plaintiff, might enter into the waters of the bathing beach and bathe therein "safely and without injury or damage;" that he, "pursuant to said contract and agreement, went upon said bathing beach and into the waters aforesaid, and, in so doing, * * * stepped * * * upon the rough, jagged, and splintered end of a certain post * * * which * * *

was by the defendant * * * wrongfully and negligently * * * permitted to so remain," * * * wherefore the plaintiff was injured.

Established rules of practice required that plaintiff should not only prove the existence of the special contract thus declared on, but also to prove the assumption by defendant of the obligation or duty as laid.

Accepted rules of practice and procedure require a plaintiff to frame his pleading with reference to some particular theoretical right of recovery, and he cannot obtain relief on a different theory from that upon which his pleading is based.

Jones *v.* Minogue, 29 Arkansas, 648.
Hayes *v.* Fine, 91 California, 391.
Baker *v.* Updike, 155 Illinois, 54.
Larison *v.* Polhemus, 39 New Jersey Eq., 303.
Arnold *v.* Angel, 62 New York, 508.
Fox *v.* Davidson, 36 New York App. Div., 159.
Stix *v.* Matthews, 75 Missouri, 96.
Terre Haute, &c., R. R. Co. *v.* McCorkle, 140 Indiana, 613.

The theory of any pleading is to be determined by its prominent and leading allegations, and usually in case of doubt as to the theory upon which the pleading proceeded the theory adopted by the trial court, with the acquiescence of the parties, will control not only in the instance tribunal, but also on appeal.

Neudecker *v.* Colberg, 81 New York, 296.
Lockwood *v.* Quackenbush, 83 New York, 607.
People *v.* Denison, 19 Hun. (New York), 137.
Allen *v.* Allen, 52 Hun. (New York), 398.
Kewaunee County *v.* Decker, 30 Wisconsin, 624.
Pierce *v.* Carey, 37 Wisconsin, 232.
Also cases cited in 21 Encyc. Pl. & Pr., 664, note 5.

Whether the action at bar was *ex contractu* or *ex delicto* was to be determined primarily by an analysis of the averments of the pleading itself. The form of the defendant's plea was of no importance.

Welsh *v.* Darragh, 52 New York, 590.
Goodwin *v.* Griffis, 88 New York, 639.

The suggestion of the learned trial justice (R., 9) to the effect that it being possible to treat the declaration as "either in contract or in tort, it seems fairer to both parties, *and especially to the pleader,* to treat it as in tort, for then all of the allegations are pertinent and proper, and none need be rejected as surplusage," would seem to be in the teeth of the common-law maxim that "everything in pleading shall be taken most strongly against the party pleading, and this on the theory that every person states his case as favorably to himself as possible, and also upon the further principle that it is incumbent on each pleader, in stating the ground of his action of defense, to explain himself fully and clearly."

Chitty's Pleading, 16th Am. Ed., Vol. 1, 261.
Gould's Pleading (5th Ed.), § 169.
Took *v.* Glasscock, 1 Saunders, 260.

It has been decided by respectable authority that if the cause of action as set forth is doubtful or ambiguous, every intendment is in favor of construing it as an action *ex contractu* rather than *ex delicto.*

Central Gas, etc., Co. *v.* Sheridan, 1 Misc. Rep. (N. Y.), 386.
May *v.* Georger, 21 Misc. Rep., 622.
McDonough *v.* Dillingham, 43 Hun., 493.
Goodwin *v.* Griffis, 88 New York, 629.
Ridder *v.* Whitlock, 12 Howard Pr., 208.
Purcell *v.* Richmond, etc., Co., 108 North Carolina, 414.
Medcalf *v.* Dart, 67 Wisconsin, 115.

In determining whether the declaration stated a cause of action *ex contractu* or *ex delicto* it should be considered in its entire scope and effect, and it will not do to separate from their context words used in one part and consider them apart from the pleading as a whole.

As before said, the form of defendant's plea is of no consequence when considering the character of the cause of action attempted to be stated in the plaintiff's declaration.

That the theory of the action which was adopted by the trial court with the acquiescence of the parties must govern for all purposes of review in the appellate court is established by a wonderful unanimity of authority (see numerous cases cited in 21 Encyc. Pl. & Pr., 664, note 5), and it has been ruled that where the cause has been tried upon the theory that a particular issue or set of issues are raised by the pleading, or where such issue or set of issues are tacitly accepted by all parties as properly presented for trial and for the determination of the jury, the appellate court in considering the propriety of a verdict rendered in response thereto and the validity of a judgment based upon such verdict should consider the evidence and the verdict in the light of the theory which governed the course of the trial, and even where the record shows that a defendant elected to stand on one of two inconsistent defenses, but the issue on the abandoned defense was the one really tried, the latter issue alone will be considered on appeal.

Smith *v.* Culligan, 74 Missouri, 387.

If, on appeal, in the absence of any motion for new trial made in the court below, the judgment would be subject to reversal because the verdict was contrary to the evidence and the law, so must it still be reversed, notwithstanding an altered theory as to the issues presented by the pleadings and supported by the proofs, put forth by the trial justice in

overruling the motion to set aside the verdict for errors apparent on the record.

That which primarily constitutes reversible error on appeal cannot be rendered innocuous by the action of the trial court on overruling a motion for a new trial.

In the light of the above suggestions and particularly in view of the course of the trial below, it may be at least interesting to analyze somewhat in detail the pleadings and the proofs in order to ascertain what were the material allegations of plaintiff's declaration which were put in issue by defendant's plea and the state of the proofs with respect thereto.

The declaration opens with a general averment that for a considerable time prior to the injury of which plaintiff complains "the defendant maintained a bathing beach at Chesapeake Beach," and for a valuable consideration to be paid to him by bathers "undertook to maintain said bathing beach and everything under the waters thereat and thereon, in a safe and proper condition, so that persons (including the plaintiff) contracting * * * to bathe there, might do so safely and without injury or damage" (R., 2).

This general averment of occupation and undertaking, and inferentially of the resulting duty on the part of the defendant, is far in excess of any obligation or duty imposed by general law upon the proprietor of a public bathing resort, whether such duty be, as it is sometimes stated, "to exercise ordinary care and prudence to keep the premises in a reasonably safe condition" (Larkin *v.* Beach Co., 30 Utah, 86), or whether it be to use reasonable care and prudence to make such places safe.

Boyce *v.* Union Pacific R. R. Co., 8 Utah, 353.

Brotherton *v.* Manhattan Beach Co., 48 Nebraska, 563; 50 *ib.*, 214.

Under this preliminary recital of the declaration the charge is, that for a consideration paid or to be paid to him the defendant maintained a bathing beach "and undertook to maintain said bathing beach and everything under the waters thereat and thereon in a safe and proper condition so that persons" contracting to bathe there "might do so safely and without injury or damage."

The contractual right in favor of the bathers at Chesapeake Beach thus averred is one of insurance whereby the defendant is charged with having guaranteed the safety of the beach and of the bathers.

Conceding, *arguendo,* that defendant was the proprietor of a public bathing resort, the extreme obligation imposed upon him by general law was to use reasonable care to make the beach safe for the use of bathers.

Having opened with this preliminary averment of defendant's occupation and duty, plaintiff next declared that on a day certain, for a specified consideration, the defendant "contracted and agreed with the plaintiff that he (plaintiff) * * * might enter and go upon * * * said bathing beach, and into the waters thereat and thereon and bathe in said waters and do all of these things safely and without injury or damage" (R., 2).

Again, the contract and agreement recited as governing the specific relations between the plaintiff and defendant is one of insurance, and from none or all of its four corners can there be derived any intimation that plaintiff was basing his supposed right to recover damages upon a qualified duty to use reasonable care.

Next, by way of still further emphasizing plaintiff's own theory as to his cause of action and the basis of his right to recover, the declaration declares that "then and there the plaintiff, *pursuant to said contract and agreement,* went upon said bathing beach and into the waters aforesaid, and

stepped * * * upon the rough * * * end of a certain post * * * beneath said waters, which said post * * * was by the defendant * * * improperly, wrongfully, and negligently left, allowed and permitted to so remain," to the plaintiff's damage.

Tested by all accepted standards, this pleading would seem to constitute a perfect example of a declaration in case for the wrongful and negligent breach of a duty or obligation imposed upon the alleged *tort feasor* by a special contract.

As is well known, the Pleading Rules (Hil. T., 4 Will., 4) have not generally been adopted in the United States, and have never been in force in the District of Columbia.

Whether, prior to the Hilleary Term Rules, a plea of *non assumpsit* to a declaration in the above form would have put in issue the alleged negligence of the defendant may be, and in our view is, questionable.

Therefore, if it was competent for defendant to treat the declaration as *in assumpsit* or case, and he elected to treat it as in case by pleading "not guilty," he was clearly entitled to all the advantages that such a plea gave him.

As an action on the case is founded upon the mere question and conscience of the plaintiff's case, and is in the nature of a bill of equity and in effect is so (Lord Mansfield in 3 Burrows R., 1353), whatever would in equity and conscience, according to the existing circumstances, preclude the plaintiff from recovering, might be given in evidence by the defendant, under the general issue, because the plaintiff must recover upon the justice and conscience of his case, and on that only.

So in an action on the case, under the plea of not guilty the defendant may not only put the plaintiff *upon the proof of the whole charge contained in the declaration,* but he may show by way of discharge a former recovery, or a release, or

an accord and satisfaction, or may give in evidence any form of justification or excuse.

Chitty's Pleading, 13th Am. ed., vol. 1, 490, citing
3 Burrows, 1353.
1 Stark., 97.
1 Willes, 45.
2 Saunders, 155, note 4.

As under the foregoing authorities the plea of "not guilty" put the plaintiff upon proof of every material averment of his declaration, including not only the proof of the contract declared upon, but also of the supposed breach thereof, and the injury and damages resulting therefrom, it would seem that the defendant is not subject to criticism for having adopted it.

At no point in the course of the trial was the conduct of the defendant at variance with this theory of the effect of his plea.

Understanding the necessity for establishing a contractual relation between the defendant and himself such as would lay the defendant under the duty or obligation towards him alleged in the declaration, the plaintiff testified that he went "to the bathing houses and at a gate which was there bought a ticket for 25 cents, which ticket entitled him to the use of a bathroom, towel and bathing suit and the privilege of bathing at that point"—that is, "in the vicinity—in front of the bath house" (R., 16), and again, that "he went to the bathing house, paid 25 cents to the attendant at the window and got some sort of a check or equivalent for my 25 cents, which equivalent I presented for a bathing suit at the entrance to the bath" (R., 19). Again he says, expressing his inability to recall whether what he got was a pasteboard or a brass check, he says, "I know it was something I exchanged for a bathing suit" (R., 20). Later he identified a pasteboard ticket consisting of two coupons and reading

"Chesapeake Beach Baths Admit One Not Good if Detached" and "Chesapeake Beach Baths Suit Ticket Not Good if Detached" without more, as "the same sort of thing" that he had bought (R., 20, 21).

The defendant testified that this ticket was "just exactly such a ticket as we sold at that time" (R., 30), and Miss Bagnan, a witness on the part of defendant, testified that the above ticket was "one of the kind of tickets being sold down there at that time," and that it was "the only kind we have ever had," and further testified that she had been employed at the beach "every season since it has been opened" (R., 34).

This was all the evidence of any sort or kind given during the course of the trial tending directly to establish the contractual relation between the parties.

On the subject of defendant's connection with or relation to the Chesapeake baths, plaintiff testified that "some six or eight months after he was injured he saw defendant Wickersham and spoke to him about his accident, but Wickersham declined to enter into any arrangement for damages, simply saying that he 'was the lessee of the bathing place down there' at the time of the accident; and that on the occasion of a subsequent interview in response to the question as to 'whether he was the lessee, the proprietor,' he said 'he was' " (R., 18, 19).

A letter from Mr. Flannery to Mr. Lewin, referred to Mr. T. A. Wickersham as "the lessee of the Bathing Beach," and Mr. Coldren, a witness for plaintiff, testified that on a certain occasion Mr. Wickersham said "in effect that he was the lessee or proprietor of that bathing beach at the time in question" (R., 26).

The plaintiff introduced in evidence a copy of the lease under which defendant operated at the beach, from which it appears that for a period of years the defendant was granted the exclusive privilege of erecting, operating, and maintaining bath houses and their appurtenances, at, on, or near the

water front of Chesapeake Beach," with "reasonable access to and from the boardwalk to be constructed along the said water front" (R., 25). The defendant himself testified that "he was the lessee and manager of the Chesapeake Beach baths at Chesapeake Beach, Maryland, on the first day of September, 1906" (R., 29), and that while he had placed the platform there and had made an enclosure by using wire screening to keep out sea nettles, "he did not claim or exercise any exclusive right in respect of bathing in the immediate vicinity of this platform;" "that many persons could, and every day they did, enter there and bathe, by coming in directly from the beach," not going "through his bath house;" "there was a great quantity of muddy substance * * * there, and he built this runway so the bathers could get beyond that without having to wade through it" (R., 31). This was all of the evidence on that point.

At the close of all of the evidence the defendant asked the court to instruct the jury to return a verdict in his favor because:

1. Wickersham had not been sufficiently connected with the *locus in quo,* and

2. Because there was neither evidence of the contract nor of the breach of duty alleged and set forth in the declaration (R., 37).

This motion was overruled, and exception to such action having been noted (R., 37) and the court having instructed the jury that the plaintiff claimed to have entered into a contract with the defendant, under which the latter "undertook to give them (customers, including plaintiff) a safe place in which to bathe" (R., 37), and that the "place was unsafe by reason of this post that was left there," and "that it was a breach of *this* contract on the part of the defendant

to allow that post to be there in that way," continued as follows:

> "I submit it to you, as a question of fact, upon all the evidence whether the two parties here did enter into the contract described in this declaration. There is evidence tending to show that they did, and if you are satisfied by the fair balance of the testimony, that they did enter into that contract, then that part of the case is made out."

Although the error in this portion of the charge, if any there was, was probably sufficiently covered by the above exception, in order to emphasize the point counsel for defendant further noted an express exception to so much of the charge "as stated to the jury that there was evidence before them tending to show that the parties to this case had entered into the contract described in the declaration" (R., 42).

As there was no evidence tending to prove the making of any such contract as that alleged in the declaration and described in the charge of the court, it is manifest that there was not and there could not be any evidence tending to prove the breach of any obligation or duty supposed to have been imposed upon or assumed by the defendant by or under its terms.

As the duty alleged in the declaration to have been assumed and breached by the defendant was other and materially different from that imposed upon the keeper of a public bathing resort by general law, it is manifest that as plaintiff failed to prove either the existence or the breach of the special contract alleged, and did not declare upon a breach of any obligation or duty imposed by general law, he has failed to establish, according to the accepted methods and processes of the common law, any cause of action against defendant, and the judgment in plaintiff's favor cannot be sustained.

In addition to the above it is submitted that the evidence given on the subject of defendant's relation to the bathing place was not sufficient to justify that portion of the charge reading as follows:

> "The bath-houses, it is conceded, were there; the runway was there. What was it there for? * * * Was that clearly held out to them as a thing which he was offering to them in consideration of the fee, as well as the privilege of having a bathing suit and a house in which to change their clothes? If so, then that part of the case would apparently be made out."

* * * * * *

In view of the plaintiff's own testimony that he "bought a ticket for 25 cents, which ticket entitled him to the use of a bathroom, towel, and bathing suit, and the privilege of bathing at that point," and of the terms of the written lease demonstrating that defendant's right and privilege consisted of the right to erect and maintain bath houses with reasonable access to the boardwalk and the water and to charge for the use thereof, it was error to permit the jury to infer from loose admissions said to have been made by defendant to plaintiff or his counsel after damage wrought and when the preparation of the suit was under way, that defendant's relation to the beach was other than as above definitely set forth.

In conclusion, we venture to cite a few cases which in one form or another furnish concrete authority for the principles of law above outlined and for which we contend.

For example, it has been frequently ruled that—

> "Where a finding of fact by the court is well supported by the evidence, but the theory upon which the court makes such finding is not set up in the declaration, a verdict based upon the finding of fact must be set aside, as not being within the issues

formed by the pleadings. The trial court should have granted the motion for a new trial."

Supply Co. *v.* Ritter, 138 Indiana, 178.
Marsatis *v.* Patton, 83 Texas, 525.

And that

"On a petition for a new trial, where the verdict is irresponsive to the issues, it is immaterial whether it is supported by the evidence or not."

Bowen *v.* White, 26 Rhode Island, 68.

And

"Where the facts proved as entitling a party to relief do not correspond with the allegations of his bill, it is not possible for the court to render a decree in his favor."

Commissioners *v.* Kerr, 13 Federal Rep., 502.

Where a declaration in an action for damages alleged negligence and unskillful work in the removal of a party wall, and the evidence undertook to show a statutory responsibility of the defendant as an insurer under building regulations, but did not support the charge of negligence, a verdict was directed for the defendant, and affirmed on appeal, this court saying:

"The rule of law is imperative that a plaintiff's allegations and proofs must conform with each other. This is an elementary rule, founded on the plainest principles of justice. A defendant cited to court is entitled to be fully and fairly informed of the nature, character, and extent of the demand upon him; and it necessarily follows that, when he is cited to answer to one charge, proof is not admissible of another and different charge. It is well-settled doctrine, as an exemplification of the rule, that in a suit for trespass or trespass on the case, when a cause of action is stated and special damages are set forth, no other cause of action and no other special damages can be allowed in evidence. It would be most unfair to the defendant, if it were otherwise; and no injustice is done to a plaintiff by the requirement of a reasonably

strict and accurate statement of that which he proposes to prove, and which necessarily in most cases lies most in his own knowledge.

But these elementary propositions of law would seem to have been in great part ignored by the appellant in this case. The allegations of the plaintiff's declaration have no support in the evidence; while the declaration itself is a confused statement, full of verbiage, and signifying little. And the brief filed on this appeal on behalf of the appellant, although a most able and luminous argument on several questions of law supposed to be involved in the case, does not seem to us to touch the questions raised by the pleadings and proofs."

Arrick *v.* Fry., 8 App. D. C., 131.

"In actions upon contract, if any part of the contract proved should vary materially from that which is stated in the pleadings, it will be fatal; for a contract is an entire thing, and indivisible. It will not be necessary to state all the parts of a contract, which consists of several distinct and collateral divisions; the gravamen is—that a certain act which the defendant engaged to do has not been done; and the legal proposition to be maintained is, that for such a consideration, he became bound to do such an act, including the time, manner, and other circumstances of its performance. The entire consideration must be stated, and the entire act to be done, in virtue of such consideration, together with the time, manner, and circumstances; and with all the parts of the proposition, as thus stated, the proof must agree: if the allegation be of an absolute contract, and the proof be of a contract in the alternative, at the option of the defendant; or a promise be stated to deliver merchantable goods, and the proof be of a promise to deliver goods of a second quality; or the contract stated be to pay or perform in a reasonable time and the proof be to pay or perform on a day certain, or on the happening of a certain event; or the consideration stated be one horse, bought by the plaintiff of the defendant, and the proof of two horses; in these and like cases, the variance will be fatal."

1 Greenleaf on Evidence, 105.

"However clear the plaintiff's equity, a material variance between the pleadings and the proof is fatal to relief."

Frank's case, 47 Alabama, 10.

"Complainant cannot base his complaint upon one definite theory and then claim the right to recover on another."

Judy *v.* Gilbert, 77 Indiana, 96; S. C., 40 Am. Dec., 28.

In Sheehy *v.* Mandeville, 7 Cranch, 215, 216, Chief Justice Marshall, speaking for the court, said:

"The errors assigned are: 1st. That the variance was not fatal; 2d. That on a writ of inquiry the production of the note was unnecessary. Courts, being established for the purpose of administering real justice to individuals, will feel much reluctance at the necessity of deciding a cause on a slip in pleading, or on the inadvertence of counsel. They can permit a cause to go off on such points, only when some rule of law, the observance of which is deemed essential to the general administration of justice, peremptorily requires it. One of these rules is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer to require that it should be repeated.

"It is not necessary to recite the contract *in hæc verba*, but if it be recited, the recital must be strictly accurate. If the instrument be declared on, according to its legal effect, that effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence. The plea of *non assumpsit* denies the contract; and an instrument, not conforming to the declaration, either in words, where it is recited, or according to its legal effect, where the legal effect is stated, although proved to be the act of the defendant, is not the same act, and therefore does not maintain the issue on his part."

To like effect is the opinion of the same court in Harrison *v.* Nixon, 9 Peters, 483.

If the defendant's obligation be stated as absolute and it is found to be qualified or subject to exception the variance is fatal, as where a declaration stated that the defendant had agreed to carry and deliver goods *safely* and the contract proved was to deliver them safely, *fire and robbery excepted.*

Chitty's Pleading, 13th Am. ed., vol. 1, p. 310.

If a declaration set up a contract to tow a vessel out of a harbor "safely and *securely,*" which would cover losses from any and every cause, and the proof shows a contract to tow the vessel out "free of damage of ice," the variance between the contracts is fatal.

Penn. Nav. Co. *v.* Dandridge, 8 Gill & Johnson, 314.

And so whether the contract in question is express or implied—

> "The first and main question in this case is, whether there was any evidence tending to prove the contract set up in the declaration. And whether the contract be special, and expressly agreed upon by the parties, or whether it be one which the law implies from the facts and circumstances, it must, in the one case as well as in the other, be proved upon the trial, to entitle the plaintiff to recover, in the 1st case, the proof showing what was actually agreed upon, in the second, the facts and circumstances which create the duty from which the defendant's promise is implied by the law. And if the facts and circumstances shown in the latter case fail to show the particular duty alleged as the promise of the defendant, or show a different duty, and therefore a different promise, such failure or such variance will be just as fatal to the plaintiff on the trial as a failure to prove an express contract, or the proof of a different contract from that alleged."
>
> "As the plaintiffs did not seek to prove an express contract in support of their declaration, it devolved

upon them to prove the delivery of the property to the company and their acceptance of it, under circumstances from which the law implies the contract declared upon; and this could only be done by showing that the company received the property as common carriers, that is to say, under circumstances which made it their duty to take care of the property in its transportation and delivery, and to protect it from all injury and loss not occasioned by the act of God or of the public enemy, or at least from all loss or injury which, in this mode of transporting this kind of property, might be avoided by human agency. *It is unnecessary to discuss the question of proof upon any other feature of the contract alleged, since, if proved in all other respects, but not in this, the contract alleged, being the entire thing, is not proved.*"

R. R. Co. v. McDonough, 21 Michigan, 165.

Upon the whole case, which, with the exception of the 8th assignment of error, would seem to have been fully discussed in the above argument, it is respectfully submitted that the judgment of the Supreme Court of the District of Columbia should be reversed and the cause remanded with instructions to set aside the verdict and grant a new trial.

The error complained of under assignment 8 is almost too plain to require specification and certainly does not call for extended argument. We refer to it here as evidence of the fact that it is deemed worthy of notice of the court and that we have not abandoned it.

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IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2023.

TURNER A. WICKERSHAM, *Appellant,*

vs.

CHARLES L. DUBOIS.

APPELLEE'S BRIEF.

WILLIAM M. LEWIN,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPELLEE'S BRIEF.

The declaration states in substance:

That the appellant (the defendant below) maintained a bathing beach at Chesapeake Beach, in the State of Maryland.

That he undertook to maintain said beach in a *safe* and *proper* condition so that persons bathing there, pursuant to contract, might do so *safely*.

That without negligence on the plaintiff's part, the plain-

tiff was injured by stepping on a jagged stake negligently permitted by the defendant to be there.

The defendant's duty arises by *implication:*

R. R. Co. vs. Laird, 164 U. S., 399.

As a conclusion of law:

Cribben vs. Callaghan, 156 Ill., 549, 551-3.

The case is within the scope of the "Bathing Beach Cases" and the verdict for the plaintiff was justifiable and right.

8 Am. & Eng. Annotated Cases, 977, 982, and Note.

POINTS.

The appellant's main reliance seems to be that there is a variance between the contract as alleged in the declaration, and the contract as proved; that the allegation that the defendant undertook to permit the plaintiff to bathe *safely* charged the defendant, as an *insurer,* whereas the evidence showed that he was only bound to use *ordinary care.*

The contract as set up in the Declaration alleges no liability other than the law imposes.

The defendant assumes that the contract alleged in the declaration makes the defendant an insurer of the plaintiff from injury while bathing, or imposes on the defendant more than reasonable care and precaution. Such is not the case.

The averment that the defendant contracted that the plaintiff should *"do all these things safely and without injury or damage"* should not be construed as making the defendant liable for an injury inflicted on a bather by a third person not under defendant's control, or an injury inflicted

by plaintiff's own fault. But implies a duty only to use *due care,* regard being had to the relative rights and duties of the parties.

Ross vs. Hill, 2 Man. Granger & Scott (C. B.) 877

Insert as additional citations at top of page 3.
Ry. Co. vs. Miller, (1897), 15 Tex. Civ. App. 428.
Coggs vs. Bernard, 2 Ld. Raym. 909.
Church vs. Cherryfield, (1851), 33 Me. 460.
Ry. Co. vs. Barnett, (1898), 65 Ark. 255.
Wright vs. Paine, 62 Ala. 340.
2 Pars. Conts. 166.
2 Kent Coms. 560, (a), 562, 564, 1.
4 Robinson's Practice, 316, 318.
Preston v. Prather, 137 U. S. 604.

injury through the lack of reasonable care by defendant. The law reads into the contract, whether expressed in the contract or not, a liability on the part of the defendant for such injury.

The plaintiff having proved the above facts and the averment in the declaration as to "safety" meaning nothing more than to require reasonable care of the defendant, the plaintiff's case is established without the slightest variance from his allegations.

The cardboard ticket shown in the evidence (R., p. 21) was not the contract between the parties. It was a mere "token" or mechanical convenience by which the plaintiff gained admission to the bath houses and the board runway to the beach. This token was surrendered by the plaintiff before the defendant's duties under the contract began.

Mann & Co. vs. Dupre, 54 Fed., 646.

It will be observed that the question does not arise on demurrer, but after a trial on the merits.

Moses vs. U. S., 166 U. S., 571, 579.
Canter vs. Colo., Etc., Co., 35 Fed., 41.

And that the declaration does not purport to set out a written instrument.

Ferguson vs. Harwood, 7 Cranch., 408, 413.
Kellogg vs. Denslow, 14 Conn., 411, 428.

As early in the history of our Federal jurisprudence as the year 1813 the U. S. Supreme Court, in a suit on a written contract, declared that courts of law leaned against an *extension* of the principles applied to cases of variance.

Ferguson vs. Harwood, 7 Cranch., 408, 413.

Nearly a half century ago the same court said that no variance should be deemed material unless *substantial,* and of a character to *mislead.*

Nash vs. Towne, 5 Wall., 689, 698.
Howgate vs. U. S., 3 App. Cas., D. C., 277, 292, 293.
R. R. Co. vs. Grant, 11 App. Cas., D. C., 107, 115.
Kellogg vs. Denslow, 14 Conn., 411, 428.
D. C. vs. Haller, 4 App. Cas., D. C., 405, 410.

Clearly the defendant was not misled. Not only did he *plead not guilty,* but he offered evidence to show that he warned the bathers of the danger, which offer was utterly inconsistent with the theory that he was defending as an insurer. Such evidence could have availed nothing *if he was an insurer* of the bathers from injury, and it could not have been offered except on the theory that he was liable only for lack of reasonable care.

Certainty to a common intent (1 Bouv. Dic., 250) is all that is necessary.

Hines vs. Gas Co., 3 App. Cas., D. C., 369, 377.

Evidence of ordinary negligence is admissible under an allegation of *gross and wanton* negligence.

Atchison vs. Wills, 21 App. Cas., D. C., 548, 561.

2 Thomps. Negligence, 1246.

Allegations of too high a duty are not variance.

13 Ency. Pl. & Prac., 895.

26 Cyc., 1389.

The averment that there was *no* light is satisfied by proof that there was no such light as was required by law.

R. R. Co. vs. Cumberland, 176 U. S., 232, 237.

Under a declaration against a defendant as an inn-keeper (*insurer*) there may be a recovery against him as a mere bailee for hire, by reason of his duty to use *ordinary care*.

Walpert vs. Bohan, 126 Ga., 532, 535.

It is immaterial whether the action is in tort or assumpsit.

Howard vs. Ry. Co., 11 App. Cas., D. C., 300, 303, 336.

Ross vs. Hill, 2 Man, Granger & Scott (C. B.)., 877, 882 (Cresswell, J.).

Atlantic & Pac. R. R. Co. vs. Laird, 164 U. S., 393, 398.

Cribben vs. Callaghan, 156 Ill., 549, 554.

The defendant, by his plea of "not guilty" (R., p. 3), treated the case as sounding in tort and thereby made up an issue, whether the action was in assumpsit or tort.

Garland vs. Davis, 4 How., 146.

Lincoln vs. Iron Co., 103 U. S., 417.

The defense throughout the case, as has been pointed out, was consistent with the theory that defendant's duty extended only to the exercise of ordinary care, and was inconsistent with any other theory.

Counsel could not have been influenced either as to presentation of evidence or as to argument to court or jury by anything contained in the court's charge, which was not delivered until immediately prior to the retirement of the jury. (R., p. 43.)

If counsel deemed the charge objectionable he should have so stated at the time.

Waters-Pierce Oil Co. vs. Deselms, 212 U. S., 159, 182.

Assuming, for the sake of argument, but not admitting, that there was a variance between the declaration and the evidence, it is rendered harmless by the statute of jeofails and is not available on appeal.

Courts of the United States exercise *equitable* jurisdiction in permitting amendments.

Eberly vs. Moore, 24 How., 158.

Some cases have gone so far as to hold, in error, that any defect *amendable* below will be *considered as actually* amended.

Townsend vs. Jemison, 7 How., 706, 721.

This is simply an application of the equitable doctrine that equity will consider as done what ought to be done, and is what the court meant, in Phillips, Etc., Co vs. Seymour, 91 U. S., 646, 655, a case in which the defect did not appear on the face of the pleadings, and the evidence was admitted under specific objection, and an exception taken when overruled.

Phillips, Etc., Co. vs. Seymour, 91 U. S., 646, 654, 655, line 3 from bottom.

This doctrine was declared applicable even to a "writ of right," which action was regarded with special disfavor by the courts.

Ex parte Bradstreet, 7th Peters, 634, 638, 640, 647.
Inglis vs. Trustees, Etc., 3 Pet., 99, 101, 133, 134, 182, 187, 188.

The appellant's exceptions to various portions of the evidence (R., pp. 18, 24, 25) relate either to the appellant's connection with the beach, or bear upon its condition at the time in question. We submit that the rulings in these particulars were correct, but, in any event, they are rendered harmless by the fact that the appellant *by his own testimony* (R., 29), confirms, in every particular, the testimony objected to.

R. R. Co. vs. McLane, 11 App. Cas., D. C., 220-224.
Hinckley vs. Pittsburg Steel Co., 121 U. S., 264, 277.

The exception at the bottom of page 42 of the Record is obviously involved in the first point contained in the second prayer (ground of motion) on page 37 of the Record, and will be discussed in connection therewith.

This leaves for discussion the two grounds of the motion as found on page 37 of the Record.

First: The defendant's connection with the beach. Upon this point we have the following testimony:

The plaintiff's testimony (p. 19) that, in reply to a question upon an occasion of negotiations upon this very matter, the defendant stated that he was the *lessee,* the *proprietor,* of that beach.

The testimony of Mr. Coldren (p. 26) to the same effect, and that the defendant admitted that he was *in charge* that day.

The letter of defendant's counsel (p. 26) speaks of his client as the *lessee.*

The *lease* by the railway company to the appellant (p. 27) carries the *bathing privileges* at Chesapeake Beach.

Joseph A. Fisher (p. 25) testified that those who took their suits paid an admission fee *just the same as those who got their bathing suits there.*

Miss Bagnan (p. 34) who, as appellant's representative, *looking after things generally,* maintained an equipment for first aid to the injured, testified that the appellant told everybody about the place *to caution patrons,* because of the presence of the jagged stakes under the water.

Indeed the defendant's own testimony (R., p. 29) is sufficient on this point, without another word.

The foregoing testimony would seem to indicate beyond any question that the defendant Wickersham "had been sufficiently connected with the *locus in quo.*"

The second portion of the ground for the defendant's motion to instruct for the defendant (p. 37) consists of two parts and if one part is bad the whole will be rejected.

Beaver vs. Taylor, 93 U. S., 46, 54.

We will consider first the latter part of said second ground:

That *no evidence* had been submitted in *proof* of the breach of duty *alleged* and *set forth* in the declaration.

This request is objectionable for the following reasons:

1. The defendant's duty was *implied* and was not *set forth* in the declaration.

R. R. vs. Laird, 164 U. S., 393-399.

Cribben vs. Callaghan, 156 Ill., 549, 551-554.

The Belgenland, 114 U. S., 355, 372.

Shrieve vs. Stokes, 8 B. Mon. (Ky.), 453.

2. If it be contended that a breach of duty is *set forth* in the declaration the request is manifestly wrong if construed as affirming absence of evidence *tending to prove* ("in proof of") the breach; it is equally wrong if construed literally, for while it is the function of the court to say whether or not there is evidence *tending* to prove a certain fact, it is for the *jury* to say whether or not the evidence is *sufficient* to prove ("in proof of") that fact.

In view of the extremely technical objections interposed by the appellant he will hardly contend that the foregoing point is objectionable because of its technical nature.

Any reference in appellant's brief to the order overruling the motion for a new trial will, of course, be disregarded, as such order is not appealable.

If counsel deemed any remark by the court, in the course of the trial objectionable, an exception should have been noted at the time.

Drumm, Etc., Co. vs. Edmisson, 208 U. S., 534, 540.

The question of the measure of damages is not before the court.

Head vs. Hargrove, 105 U. S., 45, 49.
Harrison vs. Perea, 168 U. S., 311, 325.
Waters, Etc., Co. vs. Deselms, 212 U. S., 159, 181.
D. C. vs. Woodbury, 136 U. S., 450, 460.

Arrick vs. Fry, 8 App. Cas., D. C., 131, and R. R. Co. vs. McDonough, 21 Mich., 165, are cited by the appellant as involving the principle of variance. This is true, in a certain sense; the fact is, however, that in each of these cases there was an entire failure of proof.

Railway Co. vs. Wyler, 158 U. S., 285, 296.

It is submitted that the judgment of the Supreme Court of the District of Columbia should be affirmed.

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